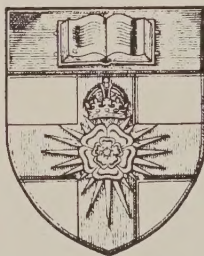


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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

POLLOCK v. GARLE.

[1897 P. 406.]

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Nov. 3.

Practice—Discovery—Inspection of Banking Account—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7. (1)

An order for inspection of entries in a banker's books under s. 7 of the Bankers' Books Evidence Act, 1879, will as a general rule be made only where they are entries in an account which is in form or substance the account of one of the parties to the litigation. If the Court has jurisdiction under that section to order inspection of the banking account of a person not concerned with the litigation, it will exercise that jurisdiction with the greatest caution.

The plaintiff sued to rescind a contract for purchase by him of shares in a company from the defendant, on the ground that the defendant had induced him to enter into the contract by misrepresentations, one of which was that the company had a certain large balance at its bankers at that time. Before the action was set down for trial the plaintiff applied to the Court under s. 7 of the Bankers' Books Evidence Act, 1879, for liberty to inspect and take copies of any accounts of the company in their bankers' books. Kekewich J. made an order for inspection with the

(1) Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7: "On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes

of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

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qualification, "but such inspection is to be limited to shewing the balance of the said company in the books of the said bankers on the 2nd of December, 1895":—

*Held*, that this order must be discharged.

THIS was an action to rescind a contract entered into on December 2, 1895, for the purchase of 150 l. shares in the Gresham Gold Exploring Syndicate, Limited, by the plaintiff from the defendant, and for repayment of the purchase-money. The ground alleged was that the defendant had induced the plaintiff to enter into the contract by untrue representations, one of which was that the company had at its bankers a sum of 87,000*l.* cash undivided. The defendant by his defence denied having made the representations, and further alleged that if they were made they were true, and in particular that at the date of the alleged representations the company had at its bankers 87,000*l.* cash undivided.

On June 29, 1897, the pleadings having been closed, but the action not having been set down for trial, the plaintiff took out a summons asking that he and his solicitor and agents might be at liberty, upon three clear days' notice, to inspect and take copies of or extracts from any accounts in the books of Messrs. Smith, Payne & Smith in the name of the Gresham Gold Exploring Syndicate, Limited, pursuant to the provisions of the Bankers' Books Evidence Act, 1879, such inspection to be held at the Banking House of the bankers.

On August 9, 1897, Kekewich J. in chambers made an order that the plaintiff should be at liberty, on three clear days' notice in writing to the bankers, "to inspect and take copies of or extracts from any accounts in the books of the said Messrs. Smith, Payne & Smith in the name of the Gresham Gold Exploring Syndicate, Limited, pursuant to the provisions of the Bankers' Books Evidence Act, 1879; but such inspection is to be limited to shewing the balance of the said company in the books of the said bankers on the 2nd of December, 1895."

The defendant appealed from this order.

*Mark L. Romer*, for the appellant. This is an unprecedented order for the inspection of an account with which the plaintiff

has nothing to do. The expressions in the Bankers' Books Evidence Act, 1879, s. 7, are very general; but it is clear from *Howard v. Beall* (1) that they are not to be construed as applying to accounts kept in the name of a person not a party to the action unless they are kept on behalf of a party to the action; and the same principle underlies *South Staffordshire Tramways Co. v. Ebbsmith*. (2)

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[He was then stopped by the Court.]

*Ernest Pollock*, for the plaintiff. The bank clearly could be called upon under the old law by subpoena duces tecum to produce their account at the trial, and an order may now be made under the Bankers' Books Evidence Act for its inspection: *Arnott v. Hayes* (3); *In re Marshfield*. (4) The observations of the judges in *Howard v. Beall* (1), and in *South Staffordshire Tramways Co. v. Ebbsmith* (2) support the right to inspection. The plaintiff is anxious to ascertain the truth of the existence of this balance. If it really existed he probably would not go on to trial.

[THE COURT suggested an inspection shortly before the trial.]

*A. J. Walter*, for the company. We object to any inspection at all. The object of the Act was to enable bankers to give copies instead of producing their books in cases where they would have had to produce them under subpoena duces tecum, which was an intolerable inconvenience when the books were in present use. According to the judgment of Kay L.J. in *South Staffordshire Tramways Co. v. Ebbsmith* (2), in order to entitle a plaintiff to inspection of an account kept in the name of a person not a party to the suit, he must shew a connection between that person and a party to the action, so as to make the account substantially the account of such party, and he must shew that the entries are material evidence in support of his case. Here no such connection is shewn, and the entries are not material to the plaintiff's case—only the balance on a given day. Now, bankers do not balance their accounts daily; so that the balance on a given day could only be ascertained by balancing the account for a considerable period. The plaintiff,

(1) (1889) 23 Q. B. D. 1.

(3) (1887) 36 Ch. D. 731.

(2) [1895] 2 Q. B. 669.

(4) (1886) 32 Ch. D. 499.



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therefore, would be enabled to investigate the banking account of the company for a considerable period, and see all the concerns of the company for that period.

LINDLEY M.R. This case raises a question of great importance to the public, and especially to commercial men. The plaintiff says to the defendant, "I bought shares from you; you induced me to do so by misrepresentation, and in particular you misrepresented the balance which the company had at their bankers at the time." The plaintiff then applied to the Court for an order to compel the company's bankers to disclose to him the account of the company, and an order to that effect has been made. That comes to this—that when two people quarrel about a matter which can be proved by the banking account of somebody else, one of the two litigants may obtain an order for him to inspect and take copies of that account. This appears to me contrary to the principles of the law relating to discovery, and contrary to the settled practice of the Court. It is said, however, that the Court has power to make such an order under the 7th section of the Bankers' Books Evidence Act, 1879, and that it ought to be made. The Bankers' Books Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers' books. If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from that inconvenience. This is accomplished by the first six sections of the Act of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books. Then comes s. 7, which has nothing to do with the protection of bankers, but has to do with the litigants. [His Lordship read s. 7.] If those words are taken literally, they say that on the application of any party to legal proceedings the Court may enable the applicant to inspect and take copies of any entries in the banking accounts of any other people. It is monstrous to

suppose that such was the intention of the Legislature. What was meant was entries in an account which is in form or in substance the account of a party to the litigation. One of the parties may be an undisclosed principal, and an account kept at a bank in the name of a third party may be really his, and in such a case inspection might properly be ordered. But when an account is the account of a person who has nothing to do with the litigation, the Court ought to look to the effect in practice of such an order on the rights of third parties, and to take care that this section is not made a means of oppression. It may be that at the trial the Court could order production of any account; but that is not the point with which we are dealing. The plaintiff wants to see the banking account that he may make up his mind whether to set the action down for trial. For that purpose he only wants to know the balance at a particular date; but the order would enable him to examine the account for some months, and see all the particulars on both sides of it, as the balance could not otherwise be ascertained. We ought to protect third parties against such a roving inspection of their accounts.

The order appealed from must be discharged, leaving the plaintiff to do what he can at the trial. This is not a case in which the Court ought at this stage to order the bankers to produce the account, even if it has power to do so.

CHITTY L.J. The Bankers' Books Evidence Act, 1879, consists of two portions. Sects. 3 to 6 protect bankers from production of their books. Sect. 7 is distinct from those, and relates to parties to the litigation.

The account to which the order under appeal relates is not in form or in substance the account of the defendant, but the account of third persons. Those persons object to having their account inspected. This is really an attempt to obtain discovery from third persons by means of s. 7 of the Act of 1879. That section is not in terms confined to entries in the account of a party to the action; but if the Court is asked for an order to inspect and take copies of the banking account of persons not connected with the litigation, it ought, if it can make such

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C. A. an order at all, to exercise the greatest caution in doing so. In  
 1897 the present case, as bankers usually balance their customers'  
 POLLOCK accounts half-yearly, the plaintiff, in order to ascertain the  
 v. balance of the company's account on December 2, 1895, must  
 GARLE. investigate the account from the time when the last previous  
 Chitty L.J. balance was struck—that is, for about five months. He could  
 look at the names and the various items, and so in fact would  
 obtain discovery of all the receipts and payments of the com-  
 pany during that period. In my opinion, s. 7 was not intended  
 to be used for any such purpose; and I agree that it would  
 inflict great injustice on third persons if it were to be worked  
 in such a way as to support the order under appeal.

Solicitors for appellant: *Cheston & Sons.*

Solicitor for plaintiff: *H. F. Pollock.*

Solicitors for company: *Wilson, Bristows & Carpmael.*

H. C. J.

C. A.  
 1897  
 Nov. 10.

# DAWSON v. AFRICAN CONSOLIDATED LAND AND TRADING COMPANY.

[1896 R. 1320.]

*Company—Directors—Clause validating the Acts of de facto Directors.*

No. 114 of the articles of a company provided that all acts done at any meeting of directors or by any person acting as a director should, notwithstanding that it should be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. T., N., and S., the de facto directors, made a call, payment of which was resisted by some of the shareholders on the ground that T., N., and S. were not de jure directors. To shew that they were not, various irregularities were alleged, the most important of which was that N. had according to the articles vacated his office by parting with all his shares. After six days he acquired other shares sufficient for a qualification, and continued to act as director. His co-directors, who had power to fill up the casual vacancy occasioned by his parting with his shares, did not formally reappoint him, but all along treated him as a director; and it did not appear that they ever knew that for six days he had not been a shareholder:—

*Held*, by the Court of Appeal, that a clause such as art. 114 did not operate only as between the company and outsiders, but also as between

the company and its members, and was sufficient to cover such irregularities as those alleged, and that the call was valid.

*Howbeach Coal Co. v. Teague*, (1860) 5 H. & N. 151, considered.

T. was an undischarged bankrupt. One of the articles provided that a director should vacate his office if he became bankrupt:—

*Held*, that this did not prevent the appointment of a bankrupt to be a director.

Decision of Ridley J. reversed.

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THIS was an appeal by the defendants, Thompson, Nielsen, and Sanders, and the company, from an order of Ridley J. restraining the appellants until judgment or further order from forfeiting or declaring forfeited all or any portion of the shares held by the plaintiffs and the other shareholders; and from selling or allotting, or otherwise disposing of such shares or any of them; and from taking or continuing proceedings to recover the amount of an alleged call of 3s. on each share, which had been made or alleged to be made by Thompson, Nielsen, and Sanders; and from parting with any proceeds of the call money in their hands, or to be received under the call.

The company was registered on February 19, 1894. By clause (40.) of the articles shares might, in default of payment of calls after notice, be forfeited by a resolution of the directors to that effect. (90.) "The number of the directors shall be not less than three nor more than seven." (91.) "The first directors shall be appointed in writing by the subscribers to the memorandum of association or a majority of them." (92.) "The directors shall have power to appoint any other persons to be directors at any time before the ordinary general meeting to be held in the year 1896, but so that the total number of directors shall not at any time exceed the maximum fixed as above." (93.) "No person other than the first directors shall be qualified to be a director who is not the holder of shares of the company of the nominal value of 200l." (95.) "The continuing directors may act notwithstanding any vacancy in that body, but so that if the number falls below the minimum above fixed the directors shall not, except for the purpose of filling a vacancy, act so long as the number is below the minimum." (96.) "The office of a director shall be vacated if he become bankrupt, or suspend payment, or compound with his creditors; if he be

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found lunatic or become of unsound mind ; if he ceases to hold the required amount of shares to qualify him for office ;” Arts. 97 and 99 provided for the retirement of directors by rotation, and for the filling up of the vacant places by the company in general meeting. (103.) “Any casual vacancy occurring among the directors may be filled up by the directors ; but any person so chosen shall retain his office only in rotation, and so long only as the vacating director would have retained the same if no vacancy had occurred.” (105.) “ Until otherwise determined two directors shall be a quorum.”

Art. 114 : “All acts done at any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.”

On February 21, 1894, the subscribers to the memorandum duly elected Dr. Bradford, the defendant Sanders, and Griffiths to be directors. On December 21, 1896, Griffiths died. On December 30, 1896, Bradford and Sanders appointed Nielsen a director in his room. No general meeting of the company was held in that year. Bradford died on April 19, 1897, and on April 21 Sanders and Nielsen appointed the defendant Thompson in his room. Two days afterwards the first general meeting was held, and approved of all the proceedings of the directors, including the appointment of Thompson, who at that meeting retired, and was reappointed.

Nielsen at the time of his appointment held the shares necessary for a qualification ; but on June 17, 1897, he transferred them all. It did not appear whether his co-directors knew of this. On the 23rd of the same month he acquired shares sufficient for a qualification ; and at a meeting of the board on June 24 he acted as director, but he never was formally reappointed.

Thompson, at the time of his appointment and of the meeting of shareholders on April 23, 1897, was an uncerti-

ficated bankrupt. There was no evidence as to whether his co-directors or the shareholders knew of this.

On June 30, 1897, the three directors, Thompson, Nielsen, and Sanders, passed a resolution for a call of 3s. per share. The plaintiffs, who were shareholders, commenced this action on behalf of themselves and the other shareholders, except the defendants, against the company, the directors, and Bifeldt, a promoter of the company, asking an injunction to the effect of the order appealed from, and also seeking to set aside certain agreements between the company and Bifeldt. Ridley J. having granted an interlocutory injunction as above, the company and directors appealed.

The ground of objection taken against the call was that there was no duly constituted board of directors when the call was made. Several irregularities were relied on as establishing this: (1.) That Sanders and Nielsen had no power to appoint Thompson on April 21, 1897; (2.) That Sanders ought to have retired in 1897, as being the director longest in office; that he did not retire, and was not re-elected; (3.) That the notice convening the meeting of April, 1897, ought to have stated that it was proposed to elect Thompson, the election of a director not in the place of one retiring by rotation being special business; (4.) That Thompson, being an undischarged bankrupt, was disqualified to be a director; (5.) That Nielsen vacated his office by the sale of his shares on June 17, 1897, and had never been reappointed. Only objections 4 and 5 were specifically noticed by the Court of Appeal. On the appeal motion it was also contended that the call was made for an improper purpose, namely, to repay the directors sums which they had paid to the promoters under the contracts which it was sought to set aside.

Alexander, Q.C., and *W. Higgins*, for the appeal. It was urged by the plaintiffs that Thompson was ineligible because he was an undischarged bankrupt. But the only qualification prescribed by art. 93 is that a person should be the holder of shares of the nominal value of 200*l.*, not even saying "in his own right." Thompson had acquired his shares since his

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bankruptcy, and they would not vest in the trustee, though he might take steps to lay hold of them—till he intervenes they belong to the bankrupt. The office is vacated by bankruptcy that the company may have an opportunity of determining whether they will keep a bankrupt as a director; but this cannot be construed as saying that a bankrupt cannot be appointed. As regards Nielsen he no doubt ceased to be a director by parting with his shares; but this was a casual vacancy which the other directors could fill up under art. 103. They, therefore, could reappoint him as soon as he acquired his new qualification. They never, it is true, made any formal appointment of him, but they treated him as a director; and it does not appear that they knew of his having been six days unqualified. But whatever irregularities there may have been in the appointment of directors are remedied by art. 114: *Briton Medical Life Association v. Jones* (1); *Newhaven Local Board v. Newhaven School Board* (2); *Palmer's Company Precedents*, 6th ed. p. 359.

Bramwell Davis, Q.C., and *Stewart-Smith*, for the respondents. Nielsen vacated his office, and no appointment was made to fill up the vacancy. He therefore was not at the time of making the call a duly constituted director. The question is whether this was remedied by art. 114. Mr. Buckley, dealing with similar words in s. 67 of the Companies Act, 1862 (Buckley on the Companies Acts, 7th ed. p. 219), says: "Endangering accuracy for the sake of brevity, it may perhaps be said that the effect of the last sentence of this section and of the similar provision frequently found in articles of association is that, as between the company and persons having no notice to the contrary, directors, &c., de facto are as good as directors, &c., de jure." Here the clause is a limited one: it applies to a defect in the appointment of directors, but does not deal with the case of a director having vacated his office. The case of *Howbeach Coal Co. v. Teague* (3) shews that a rule of this nature only applies between the company and outsiders, not between the company and its members.

(1) (1889) 61 L. T. 384.

(2) (1885) 30 Ch. D. 350, 363.

(3) 5 H. & N. 151.

[LINDLEY M.R. referred to the remarks on that case in *York Tramways Co. v. Willows*. (1)]

As to Thompson, his appointment is against the spirit if not the letter of art. 96. It is indeed against the letter, for an uncertificated bankrupt is in a constant state of suspending payment. If the contention of the appellants as to art. 114 is right, then three persons, each of whom knows that none of them are duly appointed directors, may meet and pass resolutions which will bind the company—even three strangers coming into the board room might do so.

LINDLEY M.R. This appeal is against an order of Ridley J. granting an injunction restraining the defendants from forfeiting shares and from selling or reallothing such shares, and from taking proceedings to recover money raised by calls. The ground upon which the motion was made before him was that there were irregularities in the appointment of the directors making the call, and that they therefore were not competent to act. Before us other grounds have been urged to which I will allude presently. Now, the various irregularities suggested when they come to be examined are nothing more than small irregularities. There is no radical defect in any one of the appointments. Take the best of the objections (I do not propose to allude to any of the others, because I think they are too insignificant)—take the best—the cases of Nielsen and Thompson. It appears that there were originally three directors appointed by the proper parties, the subscribers to the memorandum of association. Those three were Bradford, Sanders, and Griffiths. Nobody quarrels with their appointment. Bradford died on April 19, 1897; and on the 21st Mr. Thompson was appointed director in his place under an article which clearly authorized that appointment, subject to the point that he was an undischarged bankrupt. What I mean is this—that it was a casual vacancy which the other two directors had power to fill, and they filled it by appointing him. There was afterwards a meeting of the shareholders, and Mr. Thompson then retired and was re-elected. It was said that

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the shareholders did not know that he was an undischarged bankrupt, and our attention is called to a clause that a director vacates his appointment if he becomes bankrupt; but that clause does not apply to the facts with which we have to deal, and it appears to me to be perfectly competent for the shareholders, if they chose, to appoint Mr. Thompson. Mr. Nielsen was appointed in succession to Mr. Griffiths, who died in December, 1896. That was a correct appointment. Mr. Nielsen was a properly qualified director, and remained such till June 17, 1897, when it appears that he transferred all his shares, and for six days, from June 17 to June 23, he had no shares; so under the 96th of the articles of association he vacated his office. On June 23 he acquired other shares and became qualified. There was a meeting of the directors on June 24 at which he was present, and he acted as a director. Nielsen's parting with his shares caused a casual vacancy which the other two directors had power to fill up, and, although it is true that they did not go through the form of passing a resolution appointing him a director, they accepted him as a director, and they allowed him to act as one; and when this call which is impeached was made, namely, on June 30, 1897, it was made by Mr. Thompson, Mr. Sanders, and Mr. Nielsen; and Mr. Nielsen had then the requisite qualification for a director; so that this irregularity, which is supposed to upset everything that was done, is reduced to this: that two of the directors who might have passed a resolution appointing Mr. Nielsen did not go through that form, but acted with him as a duly appointed director. If that is not an irregularity in his appointment such as was intended to be cured by art. 114, I cannot conceive what irregularities were aimed at by that article.

Art. 114 is as follows: [His Lordship read the article.]

Now it is reducing that clause to a nullity to say that it does not apply to such trivial irregularities as those with which we have to deal here. But it is said that we must, under the stress of the case of the *Howbeach Coal Co. v. Teague* (1), hold that this article does not apply between the company and its members. I do not understand how the case of the *Howbeach*

(1) 5 H. & N. 151.

Coal Co. v. Teague (1) can be cited as an authority to the effect that such an article only applies to outsiders dealing bonâ fide with the company without notice. Of course it applies to and covers all such transactions; but I cannot find anything in the judgments in the case of *Howbeach Coal Co. v. Teague* (1) which warrants the contention that such a clause does not apply as between the company on the one side and the shareholders on the other side. The case is intelligible up to a certain point; and as to the rest of it, it is so reported that I confess I do not thoroughly understand it. In that case, the directors who made the call had been improperly appointed by three out of seven of the subscribers to the memorandum of association, which was entirely wrong, and the Court held that the validity clause there, which was similar in its terms to art. 114 here, did not cure that radical defect in their appointment. That was the ratio decidendi, and that I follow perfectly well. Then comes a part of the case which I do not follow with equal ease. Granting that the appointment of these gentlemen was altogether wrong, as it obviously was, and granting that the validating clause there did not apply to make their appointment valid, I do not see myself that it necessarily follows that what they did, although they had been improperly appointed, would not be validated, and I do not see that any of the judges, in giving judgment in that case, addressed himself to that point. There may have been very good grounds for the decision; it may be that the clause did not apply even to that extent, because there was no subsequent discovery, the whole thing having been aboveboard and the defect known to everybody. I do not know how that may be; but the case is no authority, to my mind, for the proposition for which it was put forward, and which will alone assist the respondents in this case, namely, that art. 114 does not apply to such matters as forfeiture of shares—that is to say, to matters between the company on the one side and the shareholders on the other. I cannot conceive why we should cut down such general language as that of the article and say that it applies only to non-members. I think that is wrong. It appears to me, therefore, that these objections,

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whatever they might be worth but for this clause—and I do not think they would be worth much—are absolutely worthless with it.

Another point was taken before us, which would be a much more serious one if there were any evidence to support it. We are asked to restrain this proceeding of forfeiting shares and otherwise enforcing payment of a call, because the call had been made for an improper purpose; namely, not for the purpose of bonâ fide carrying on the company, but for the purpose of recouping directors who have paid off the promoters what they claimed under agreements which the writ in this action asks to have rescinded. This is a case which might have become important. We are told that the agreements have been carried out, and it is difficult for one shareholder to sue, on behalf of himself and others, to rescind an agreement between the company on the one side and the promoters on the other. It needs a very strong case to justify such an action; but apart from that, there is no evidence to support such a case. There is a mere suggestion of fraud and misconduct—a mere suggestion as to which we have nothing reliable to act upon. The appeal must be allowed, and the order discharged with costs here and below.

CHITTY L.J. I agree. I desire to say one word as to the 114th article. It is not framed so as to render valid a resolution passed by any persons who without a shadow of title assume to act as directors of a company. The case put by Mr. Stewart-Smith, that if three or four strangers went into the board room and passed a resolution the clause would, according to the contention of the appellants, support their acts and make them valid, is disposed of by the mere reading of the clause. The clause is addressed, as is shewn by the words “some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified,” to cases of defective appointment or disqualification.

As regards the case of Nielsen, he was six days without the necessary qualification for a director—namely, from June 17 to 23. There is no evidence whatever to shew that the other two directors were aware that he had parted with all his shares so

as no longer to hold his qualification. It is said, and rightly said upon reading the articles, that he ceased to be a director on June 17 because he ceased to hold the requisite number of shares; but on June 23 he held the requisite number, and he went on acting as director with the other directors, and they treated him as a director. They did not indeed formally reappoint him, but they had power to do so, and there cannot be the slightest question that if the defect had been pointed out they would have appointed him to fill up the vacancy. The point here is the defect in the appointment. There was no defect in the original appointment of Nielsen: the defect was that he had become disqualified. It was argued that the words "were disqualified" in art. 114 refer only to want of qualification at the time of appointment; but the words are not "were non-qualified at the time of appointment," but "were disqualified," which plainly include a subsequent loss of the qualification which is required in order to enable a man to act as a director. That is exactly within the words of the article, and is one of those defects, irregularities, or whatever else one ought to call them, which are remedied by the article.

It is then said the article is not to operate as between the company on the one hand and the members of the company on the other, but is only to be applied to outsiders. The answer to that is that in the article itself no such distinction is made. Whether in any case a distinction might be taken is quite another matter. It cannot be taken upon the facts of this case; and I am quite satisfied that in the present case the article does apply as between the company on the one hand and the member who is being sued for a call on the other.

It is hardly necessary to add anything about the *Howbeach Case*. (1) There it was quite plain that the directors who were purporting to act, and whose appointment was derived from the acts of the signatories, were not well appointed. The reasons are not given by the learned judges why they held that the 60th clause in that case did not apply so as to validate their acts; but it was quite open to say that in that particular case the appointment was so radically bad that the defect did

(1) 5 H. & N. 151.

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not fall within the protection. For these reasons, and in conformity with what has fallen from the Master of the Rolls, I think that all these points with reference to irregularity fall to the ground, and I think it is quite unnecessary to go through other somewhat similar matters which have been mentioned. Nielsen's case seems to me to be the only one that requires anything like a formal judgment.

Then there is the other point which was put forward at the bar before us on this appeal, that the call was made for a fraudulent or improper purpose; that the directors made the call in the interests of some one of them; and that the call on that ground could not be supported. It would require a strong case to justify us in saying on motion that the call was fraudulently made; and the simple answer that we have to give is that the evidence has not proved in any material degree the kind of case that was shadowed out by the counsel for the respondents.

I reserve to myself the full power of considering whether some of the shareholders can, on any such materials as have been presented to us, sue on behalf of themselves and the other shareholders for the rescission of the company's contract. That point does not arise because there is no case brought forward to shew a preponderating control by the directors over the company's affairs such as to make a general meeting of shareholders nugatory.

VAUGHAN WILLIAMS L.J. I entirely agree. I only wish to say that it is not necessary to decide anything about the true meaning of the words "afterwards discovered" because, as the Master of the Rolls has already pointed out, in this case there is no evidence whatever that the directors did know of the defects at the time of the passing of the resolution for a call.

Solicitors: *Burgoyne Watts & Co.; Wyatt Digby & Co.*

H. C. J.

In re SAUNDERS.
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[1896 S. 3699.]

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Appointment—Stock sufficient to raise a “Net” Sum—Incidence of Succession Duty.

The donee of a special power of appointment contained in a settlement appointed that so much of the stocks and securities held by the trustees “as shall be sufficient to raise the net sum of 2000*l.*” should, subject to the life interest therein of the appointor, “henceforth belong and be vested in” E., an object of the power, “and be held in trust for him” :—

Held, that the appointee took the fund free from succession duty.

Decision of Stirling J., [1897] 1 Ch. 888, reversed.

Banks v. Braithwaite, (1862) 32 L. J. (Ch.) 35, questioned.

APPEAL against the decision of Stirling J. (1)

By a marriage settlement, dated January 15, 1855, certain funds were, in the events which happened, settled upon trust for the wife, Mrs. Saunders, for her life, and after her decease upon trust for the children of the marriage as she should by deed or will appoint.

In exercise of this power of appointment Mrs. Saunders, by several deeds-poll, respectively dated in 1894, appointed to her son, Edward George Saunders, portions of the settled funds sufficient to raise three sums of 2000*l.*, 3000*l.*, and 4000*l.*

All the three appointments were made in the same form.

By the deed relating to the 2000*l.* Mrs. Saunders appointed “that so much of the stocks, funds, shares and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of 2000*l.* shall, subject to the life interest therein of the said Ellen Anne Saunders, henceforth belong and be vested in the said Edward George Saunders, and be held in trust for him the said Edward George Saunders, his executors, administrators and assigns.”

Mrs. Saunders also made appointments in similar terms in favour of other children of the marriage, and ultimately, by a

(1) [1897] 1 Ch. 888.

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deed-poll dated February 14, 1895, she appointed the whole of the unappointed funds to her son Hugh Ettrick Saunders.

Hugh Ettrick Saunders subsequently assigned his interest under the appointment to him, and was adjudicated a bankrupt.

An originating summons was taken out by Edward George Saunders to determine whether he was entitled to the sums appointed to him free from succession duty. The defendants to the summons were the trustees of the settlement; the trustee in the bankruptcy of Hugh Ettrick Saunders; and the assignees of his interest.

Another of the appointees was made a defendant by amendment.

Stirling J. held that the plaintiff took the fund appointed to him subject to the payment of succession duty. His Lordship was of opinion that the case was governed by the decision of Kindersley V.-C. in *Banks v. Braithwaite*. (1)

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Medd*, for the appellant. The decision of Stirling J. is inconsistent with *Harper v. Morley*. (2) The learned judge thought that he was bound by *Banks v. Braithwaite* (1); but there *Harper v. Morley* (2) was not cited. If a gift were made to several persons in succession the rate of succession duty might be different as regarded each of them, and an obligation might be imposed on the trustees which they would not be able to fulfil. In *Banks v. Braithwaite* (1) Kindersley V.-C. really gave no effect to the word "clear." If there is a conflict between *Harper v. Morley* (2) and *Banks v. Braithwaite* (1), the former should be preferred as being the more consistent with common sense.

[LINDLEY M.R. referred to *Sanders v. Kiddell*. (3)]

CHITTY L.J. In the case of a legacy the executor can deduct from it nothing except duty. The costs of administration and of raising the legacy must be paid out of the residue, and therefore in such a case the word "clear" or "net" could only refer to duty. Does that apply to an appointment of a fund?

(1) 32 L. J. (Ch.) 35.

(2) (1838) 2 Jur. 653.

(3) (1835) 7 Sim. 536.

Would not the appointee, in the absence of the word "clear" or "net," have to bear the costs of raising or transferring the fund, so that there would be something besides succession duty to satisfy the word?]

There is no distinction between the words "clear" and "net": *In re Currie*. (1) The present case cannot be distinguished from *Wilks v. Groom*. (2) See also *Peareth v. Marriott*. (3)

Godefroi, for another party in the same interest. If the appointment had been of a sum of money the word "net" could only have referred to succession duty.

Swinfen Eady, Q.C., and *Peterson*, for the assignees of H. E. Saunders. The subject-matter of the gift is, so much of the trust funds held by the trustees "as shall be sufficient to raise the net sum of 2000*l.*" Might not the trustees immediately after the appointment was made have appropriated a sum of Consols or some other security to answer the appointment? The appointment is not a direction to pay a "clear" or "net" sum to the appointee. The sum mentioned is the measure of the gift; it is not a gift of the sum mentioned to the appointee clear in his hands of all deductions. This distinguishes the present case from many of those which have been cited. There is a gift of a net sum of 2000*l.* to the appointee, but subject to succession duty.

[CHITTY L.J. The trustees are liable to the Crown for the duty.

VAUGHAN WILLIAMS L.J. referred to *Haynes v. Haynes*. (4)]

In *Peareth v. Marriott* (3) the direction was to pay to the legatee during her life such an annual sum as would (together with other dividends to which she was entitled) produce to her a clear annual income of 1500*l.* In *In re Currie* (1) the appointment was of so much of the trust funds as should be "of the clear value of 1000*l.*," and the distinction was pointed out in the judgment. In *Harper v. Morley* (5) a clear yearly sum was to be applied for the benefit of the testator's son and his children. *Banks v. Braithwaite* (6) governs the present case.

(1) (1888) 36 W. R. 752.

(2) (1856) 2 Jur. (N.S.) 798.

(3) (1882) 22 Ch. D. 182.

(4) (1853) 3 D. M. & G. 590.

(5) 2 Jur. 653.

(6) 32 L. J. (Ch.) 35.

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C. A. [LINDLEY M.R. The language is not the same here.]
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In re. *Cozens-Hardy, Q.C.*, in reply. The mention of 2000*l.* is not
 SAUNDERS a mere measure of value. *Banks v. Braithwaite* (1), even if it
v.
 GORE. is good law, is distinguishable from the present case.

Cur. adv. vult.

Nov. 18. LINDLEY M.R. The question in this case turns upon the construction of a deed appointing a fund which was the subject of the trusts of a marriage settlement. In the events which have happened those funds were vested in trustees upon trust for Mrs. Saunders for her life, and subject thereto upon such trusts for the children of the marriage as she should by deed or will appoint. She made various appointments, three of which were in the same form, and I will deal with one of them only. I will read it from the report (2), and I take it for granted that it is sufficiently set out there. [His Lordship read the appointment, and continued :—]

The question is, What is the effect of the expression "the net sum of 2000*l.*"? The controversy relates to the liability to succession duty. Stirling J. has construed this appointment thus. He says (3): "Applying that reasoning" (i.e., the reasoning of Kindersley V.-C. in *Banks v. Braithwaite* (1)) "to the present case, what is given here is not the net sum of 2000*l.*, but so much of the stock as will be sufficient to raise the net sum of 2000*l.*; and when that is ascertained by the proper calculation, as the Vice-Chancellor says, that particular sum of stock is to belong to the appointee. In my opinion the present case falls within the decision of *Banks v. Braithwaite* (1), and the appointment does not carry with it the succession duty, but the appointee takes subject thereto." I confess it appears to me that what is thus given to Mr. Edward Saunders is the net sum of 2000*l.* in stock. Though, of course, I can see it in words, I cannot follow in this deed the distinction between the measure of the sum and the sum itself. We are

(1) 32 L. J. (Ch.) 35.

(2) [1897] 1 Ch. 888.

(3) [1897] 1 Ch. 892.

discussing simply a question of amount, and, bearing that in mind, it appears to me that the true meaning and intent of it is, an appointment of a net sum of 2000*l.* in a particular form. If that be the true construction, how can it be held that any expenses—of what kind soever—are to come out of this net sum of 2000*l.*? The net sum which is given is not to be subject to any deduction. That is how I understood the language apart from all authority, and I cannot regard the appointment as a gift of so much stock as will be sufficient to raise the sum of 2000*l.* to be given to the appointee without seeing that the intention is to give him that net amount. If I could arrive at the conclusion that the net sum of 2000*l.* is what has been called the “measure” of the gift, and that the “net sum” was not to be given to the appointee, the case would be different. It is not like instructions to a broker to sell stock sufficient to raise a specified sum. The broker has nothing to do with the application of the net sum when raised. You must look at the document and its object. It is a gift by way of appointment by a mother to her son, and the question is, what has she given to him? I confess that, apart from authority, I should put the construction which I have mentioned upon the words.

I am not going through the authorities, but as regards *Banks v. Braithwaite* (1), which so much pressed upon Stirling J., and in deference to which he decided the present case, I must say that I should not have construed the words in that case as *Kindersley V.-C.* did. There the testator “gave the residue of his personal estate to trustees, upon trust to set apart 10,000*l.* Consols and pay the dividends thereof to his sister for life, and after her decease to retain so much of the said sum of Consols as should be sufficient to realize the clear yearly income of 150*l.*, and he directed the trustees to pay the dividends and other income of the trust stock lastly directed to be retained by them to his nephew for life, &c.” I should have read that as a gift of a clear yearly income of 150*l.* to the nephew. However, I can see the difference between that case and the present, because, having regard to the different rates of legacy duty, there there was a difficulty in working out the principle which

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I should have endeavoured to apply to that case. Here we are not embarrassed by anything of that sort. This is a simple appointment to Edward George Saunders of the specified sum. On the true construction of this deed it appears to me that *Banks v. Braithwaite* (1) and other cases like it do not apply. I see that there is a difference between a legacy and an appointed fund. The rule as regards legacies is, that the costs of administration come out of the residue, unless the contrary is expressed, and therefore, where there is a legacy of a "clear" or "net" sum, there is nothing to which those words can be applied except the legacy duty, for all the expenses come out of the residue. But that reasoning does not apply to an appointed fund. But still, if you ask me what the meaning of "clear" or "net" is when applied to an appointed fund, I think that *primâ facie* it means what it says—clear of everything. There may be reasons for not giving that effect to it; there may, for instance, be a difficulty by reason of varying rates of duty. But here there is no difficulty at all, and I cannot see any justification for saying that the "net" sum here means clear of the expense of raising it but subject to something else.

I think, therefore, that the appeal must be allowed; and in this particular case I think that the costs should come out of the last appointed fund.

CHITTY L.J. I agree. The question is as to the construction of a deed of appointment under a special power. As regards legacies, the authorities have settled that, when a legacy is given to one person, so that only one rate of duty is payable, if the gift is of a "clear" sum of money, the legatee takes free of duty. It is sufficient to refer to *Haynes v. Haynes* (2) for that proposition. But there is undoubtedly some distinction between a legacy and a portion of a fund subject to a power of appointment. A legatee bears none of the expense of raising his legacy: that falls on the general estate, and a legatee of 1000*l.* is entitled to his 1000*l.* But in order to free him from the legacy duty there must be some words which shew an intention to that effect, and the word which has been relied on

(1) 32 L. J. (Ch.) 35.

(2) 3 D. M. & G. 590.

for that purpose is "clear." I can make no distinction between "net" sum and "clear" sum. In the case of an appointment, if there are no words to the contrary, all the appointees have, according to the general rule, to bear rateably the expenses of the trustees in relation to the administration of the fund, including its distribution. It might be said that the word "net" in this instrument refers to those expenses only; but I think that would be a narrow construction. That is not the construction which was adopted by Kay J. in *In re Currie*. (1) There there was an appointment under a general power of so much of the trust funds as should be "of the clear value of 1000*l.*," and Kay J. held (and I agree with his reasoning) that it was an appointment of a sum of 1000*l.* clear of all the trustees' expenses, and clear also of the succession duty. There is no distinction between legacy duty and succession duty in such a case as the present. Here the appointment is not of a sum of money to be raised by the trustees by a sale; it is an appointment of a portion of the trust funds. The trust funds (as it was agreed at the Bar) were invested in ordinary trust investments, and liable to be changed from time to time under a power to vary securities. It is of a portion of the trust funds thus invested that the appointor disposes, and disposes of it by one operation only. You must ascertain (by reading the words) what that portion is, and that portion itself is given to the appointee. Now, it appears to me on the true reading of this deed that, in ascertaining what portion is appointed, you must, in accordance with the language used by the appointor, clear the portion from all charges, including succession duty—"so much of the stocks, &c., as shall be sufficient to raise the net sum of 2000*l.*" That "net" sum of 2000*l.* is to be arrived at by excluding from it the trustees' expenses, and also, I think, the succession duty. The case is not the same as *Banks v. Braithwaite* (2), by which Stirling J. considered himself bound. Observations have already been made by the Master of the Rolls on that case, and I must confess that on the construction of that will I should have arrived at a different conclusion. There a fund of Consols was

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(1) 36 W. R. 752.

(2) 32 L. J. (Ch.) 35.

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set apart for one purpose, and for one purpose only—namely, the benefit of an annuitant; and subject to that the fund, which was to be retained in Consols, was to go to the residuary legatee. The direction was to retain a sum of Consols “sufficient to realize the clear yearly income of 150*l.*,” and then the trustees were directed to pay the dividends of that sum to the annuitant. I think the whole object of the testator there was to provide a clear yearly income of 150*l.* a year for the benefit of the annuitant. I understand the reasoning of the Vice-Chancellor, but I think it is too fine (if I may say so) to make it applicable to that case. Of course the Consols might have been converted, and the rate of interest payable on the Consols might have been subsequently reduced by an Act of Parliament. It is, as I have said, a question of construction, and I think that the present case is not governed by *Banks v. Braithwaite* (1), whatever may be thought of that case, and that the true construction is, that this appointed portion of the trust funds was to be clear of all charges, and that, on a just construction, we ought not to confine the word “net” merely to the expenses of the trustees.

VAUGHAN WILLIAMS L.J. The question is as to the construction of the words used in a particular appointment. The Master of the Rolls and Chitty L.J. have already expressed very clear views as to what ought to be the construction of the words used in this particular appointment. I cannot say that I myself am by any means so clear as they are as to the proper construction of the words; but, having regard to the fact that this is merely a question of the construction of particular words in a particular document, I am not prepared to differ merely because I hesitate about that which to them seems clear. But I wish to say a few words as to the difficulty which occurs to my mind in the construction of this document. The words are these: “that so much of the stocks, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of 2000*l.* shall, subject to the life

(1) 32 L. J. (Ch.) 35.

interest therein of the said Ellen Anne Saunders, henceforth belong and be vested in the said Edward George Saunders."

Now, to my mind, the question which has to be answered is this: Ought the word "net" to be annexed to the gift, or to what I agree is precisely the same thing, the measure of the gift, or ought that word to be annexed, not to the gift or the measure of the gift, but to the raising of the sum? Is the word "net" to be treated as qualifying the amount of stock with which the trustees were to deal, or is the word to be read as annexed to the gift to Edward George Saunders?

Various authorities have been cited; but it seems to me that in this case, as indeed in every case, it is a dangerous thing to lay down any general rule as to the meaning of words of this sort. You must always look at the whole document, and ascertain what the meaning of the words is when you have taken the whole document into consideration. It is not safe to say there are authorities which decide that a "clear" gift means, in the case of a legacy, a gift clear of legacy duty. No doubt very often—and you may go further and say generally—in wills, when a legacy is thus given such would be the meaning of the word "clear," because in the nature of things there is nothing else of which the gift can be "clear," and unless you give that meaning to the word "clear" you give no meaning to it at all. But even in the case of a legacy it is not quite true to say that it is universally so. For I take it that if you have a legacy, and the word "clear" is used, it might well be that you could find in the nature of the gift something to indicate that the word was not meant to import clear of legacy duty: for instance, if the gift was of an annuity to a series of annuitants in succession. But in the present case the question arises at an earlier stage. It is, to my mind, precisely the question which Kindersley V.-C. propounded to himself in *Banks v. Braithwaite* (1), and which Stirling J. propounded to himself in the present case, namely, is the word "net" here to be annexed to the gift, or is it to be annexed simply to the duty which the trustees had to perform? Is it to be construed as merely quantifying (if I may so say) the subject-matter with which the

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trustees were to deal, as distinguished from fixing the quantum of the gift? One can quite understand that there might be a collocation of words which would make it plain that the word "net" or "clear" was meant to be annexed to the gift, as, for instance, if the two words "raise" and "pay" were placed in immediate collocation. If the document—will or appointment—says, you are to raise and pay the "clear" sum of so much, it would, I think, be plain that this quality "clear of deduction" was to apply, not only to the sum to be raised, but also to the sum to be handed over or given to the donee. In the present case there are not any words so plain as that, because, so far as English grammar is concerned, the word "net" seems to me to be limited in its application to the sum to be raised, or rather to the amount of Consols to be handed over, and is not, so far as grammatical collocation is concerned, to apply to the amount which is to be transferred to the donee. Having said this, because I have a very strong feeling as to the danger of deciding the meaning of particular words in a particular document by laying down any rule of universal application, I concur in the decision of my learned brethren, because I am not prepared to say that, having regard to the words of this particular document, the construction which they think to be right is not the right construction. Documents of this kind are generally drawn by lawyers, but of course they are occasionally drawn by laymen, and I think that it is always a dangerous thing to conclude the construction of words in a particular document which may be under consideration by decisions which have been arrived at on similar words in other cases.

Solicitors: *Valpy, Chaplin & Peckham; Witham, Roskell, Munster & Weld; Hasties.*

W. L. C.



BLUMBERG v. LIFE INTERESTS AND REVER-  
SIONARY SECURITIES CORPORATION.

[1896 B. 4531.]

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Dec. 4.

*Tender—Validity—Cheque—Authority of Solicitor.*

Appeal of plaintiffs from Kekewich J., [1897] 1 Ch. 171, dismissed with costs, on the facts.

THIS was an appeal by the plaintiffs from the decision of Kekewich J. already reported. (1)

*Cozens-Hardy, Q.C.*, and *Frank Evans*, for the plaintiffs, contended that the tender made by the plaintiffs was sufficient, and, in addition to the authorities cited in the Court below, referred to *Pape v. Westacott*. (2) They also read the affidavits filed on the motion, and insisted that, on the facts, the plaintiffs had suffered damage through the defendants' action in proceeding with the sale.

[VAUGHAN WILLIAMS L.J. The affidavit of the managing clerk to the mortgagees' solicitor says that the sale produced 4605*l.*, and that this was an "excellent price," and this is not denied. Where then are your damages?]

*Renshaw, Q.C.*, and *T. Ribton*, for the defendants, were not called upon.

LINDLEY M.R. The plaintiffs have no grievance whatever. There is no point either of law or substance or anything else justifying this appeal, and it must be dismissed with costs.

CHITTY and VAUGHAN WILLIAMS L.JJ. agreed.

Solicitors: *Braham Barnett*; *H. Stanley-Jones*.

(1) [1897] 1 Ch. 171.

(2) [1894] 1 Q. B. 272, 277-8, 281.

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Nov. 16, 17.

*In re* FREMAN.  
DIMOND v. NEWBURN.

[1897 F. 297.]

*Settlement—Tenant for Life and Remainderman—Repairs.*

Necessary repairs on real estate purchased in accordance with a power in a testamentary settlement of personalty, by the direction or with the consent of the tenant for life, to invest in (in *ter* alia) land to be held as personal estate :—

*Held*, chargeable to capital.

THIS was an originating summons to determine certain questions as to repairs necessary to be executed on real estate in which part of the residuary personal estate of John Freman, the testator in the summons, had been invested.

The testator bequeathed his residuary personal estate to trustees upon trust to call in such parts thereof as should not consist of money or be invested in manner therein mentioned, and, after payment of debts, funeral and testamentary expenses, and legacies, to invest the proceeds in the purchase of parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, but not in Ireland, or in railway debentures in Great Britain. He directed the income to be paid to his daughter Elizabeth Frances Freman for life; and, after her death, the capital to be held in trust for her children as therein mentioned; and he gave his daughter power by deed or will to appoint to any husband she might marry a life interest after her own death. He directed that, in case his daughter, or any children of hers, should survive him, or should be born after his decease, proceedings should be instituted in the Court of Chancery to administer such part of his residuary personal estate as should have been invested in or consist of Government bank annuities or stocks and South Sea Stock, and that the same investment should be transferred into court. The will contained the following power: "Provided [always and I also declare that the trustees or trustee for the time being of this my will shall

by the direction or with the consent of my said daughter after she shall attain the age of twenty-one years and during the remainder of her life and as well until she attains that age or after her death at their or his discretion alone and notwithstanding the institution of any suit under the direction aforesaid lay out and invest any of the trust moneys for the time being in their or his hands in or upon any Government or real security or securities or on railway debentures in England or Wales but not in Ireland at interest or in the purchase of freehold or copyhold lands and hereditaments or leasehold lands or tenements held for an unexpired term of sixty years or upwards and alter and transpose any of the securities or investments for the time being vested in them or him into other securities or investments of a like nature And that as to any of the Government annuities stocks or funds or South Sea Stock hereinbefore directed to be transferred into the name of the said accountant-general in the suit herein directed to be instituted the same or the produce of the sale thereof shall or may be (with the approbation of the said Court in the said suit) laid out and invested in such Government or real or railway securities or lands hereditaments or tenements as aforesaid at interest And in case any of my said personal estate shall be laid out in the purchase of lands or hereditaments such lands and hereditaments shall be liable to a trust for sale to be exercised by the trustees or trustee for the time being of this my will in order that my said personal estate so laid out may notwithstanding such investment as aforesaid retain for the purposes of this my will the character of personal estate."

The testator died in February, 1853, leaving one child, Elizabeth Frances Freman, who attained the age of twenty-one years in 1854, and in November of that year she married Gerard de Witte.

Shortly after the testator's death a suit, *Freman v. Whitbread*, was instituted in the Court of Chancery, in accordance with the directions for that purpose contained in the testator's will. And the greater part of the testator's residuary personal estate was transferred into court in that action.

Under an order of the Court dated July 15, 1862, made in the

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NORTH J. suit of *Freman v. Whitbread*, the sum of 34,900*l.*, the proceeds of part of the testator's personal estate then in court, was invested in the purchase of an estate at Chislet, Kent, with the consent of Elizabeth Frances de Witte, and was conveyed to the trustees of the will, to be held on the trusts of the will. 1897  
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Elizabeth Frances de Witte died in 1868, leaving issue four daughters, and having appointed by will a life interest in the trust premises to her husband, who mortgaged his life interest. The estate at Chislet was let, and the mortgagees of the tenant for life received the rents. Certain repairs to the buildings on it were necessary, and this summons was taken out by the present trustees of the will for the determination, under Order LV., r. 3 (g), of the Rules of the Supreme Court, 1883, among other questions, whether the plaintiffs, as trustees of the said will, are under any and what obligation or duty, or have the power, and if so to what extent, to keep in repair or saleable condition the mansion-house, out-buildings, farm and other buildings on the Chislet estate, now vested in them as such trustees.

And if the above question be answered affirmatively, how and from what source, as between the parties interested during the life of the said Gerard de Witte and those interested in remainder in the said Chislet estate, the necessary costs of repair should be defrayed, and how the costs of the application should be borne.

*Fellows*, for the trustees.

*Ingle Joyce* and *J. W. M. Holmes* for first mortgagees, and *Methold* for second mortgagees of the life interest of Gerard de Witte. The established rule is that necessary repairs of settled land are to come out of capital.

*Vernon Smith, Q.C.*, and *Sheldon*, for persons entitled in remainder. The repairs are to be provided for in a manner that is equitable between the tenant for life and remaindermen. In cases where the land was placed in legal settlement by a testator, the Court considers that the testator intended that the tenant for life should not bear the cost of repairs, except so far as his income was reduced by the sale of part of

the trust property, or keeping down the interest on capital borrowed on mortgage for the purpose of the repairs: *In re Hotchkys* (1); *Powys v. Blagrove* (2); *In re Cartwright*. (3) This case is different from one where the testator had himself settled land. Here the settlement is one of personal estate, capable of being invested, with the consent or by the direction of the first tenant for life, in land; it is not equitable, to use the expression of Cotton L.J. in *In re Hotchkys* (4), that the trust funds should be sold out and invested by the direction or with the consent of the tenant for life who was to enjoy the whole income, and that the property should, for the benefit of that tenant for life, be allowed to diminish in value. Where an equitable tenant for life is put in possession by the Court, that is done on terms of his keeping the property in repair: *In re Wythes* (5); *In re Bagot's Settlement*. (6)

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NORTH J. I think that in this case I must follow the intimation of the opinion of the Court in *In re Hotchkys*. (1) The power of investment is in a form which I do not recollect having seen before. It is common to find in a settlement of personal estate a power (very often by the direction of the tenant for life) to invest in a house, the object being that it should be for the personal occupation of the tenant for life; but this power is not addressed, in terms at any rate, to land for the occupation of this particular person, and the power to direct that it should be invested in securities A, B, C, D, or land, is one I do not recollect to have ever seen before. So long as the personal estate is invested on personal securities the tenant for life receives the income. When it is invested in land, the tenant for life will receive the income in the same way as she received the income of the existing investment before the other securities were converted to raise the money to lay out upon land. I can quite understand that where there is such a power as this in the will to invest on the direction of the tenant for life, it is expedient that the person

(1) (1886) 32 Ch. D. 408.

(4) 32 Ch. D. 415.

(2) (1854) 4 D. M. &amp; G 448.

(5) [1893] 2 Ch. 369.

(3) (1889) 41 Ch. D. 532.

(6) [1894] 1 Ch. 177.

NORTH J. who gives such a power should go on to direct how the repairs are to be provided for. But nothing of that sort is to be found in this will. The power is an isolated one at the end of the will. There is nothing else in the will throwing any light whatever upon this clause. The result is that the investment is to be made for the benefit of the parties interested in the fund invested—the tenant for life and the persons entitled in remainder. If this had been land given by the will, it is clear that the tenant for life would not have been under any obligation to repair. *Powys v. Blagrove* (1), and the subsequent case *In re Cartwright* (2), before Kay J., make it perfectly clear that the tenant for life is under no obligation to keep the property in repair. That is so as to lands settled by the will. This is land obtained by purchase under an investment clause of personalty in the will, and there is a direction that although the money is converted into land, or is invested in real estate, it is still to remain personal estate by virtue of the trust for conversion back again, and not to be real estate. That regulates the rights of the parties, so far as their rights depend upon the nature of the property. If a cestui que trust died, it might be all-important between his heir-at-law and next of kin that such a direction should be inserted. But in the meantime, before the land is sold again, it is land, and it is to be enjoyed as land. Although, no doubt, in this case the legal estate is in the trustees, and the tenant for life is only equitable tenant for life, and entitled to receive the income of the investment in that character, yet it is clear, whether that tenant for life had the legal estate or the equitable estate only, there would be no obligation on him to keep in repair the property devised. This investment brings within the scope of the will property which is not devised in terms, but which the testator has given power to acquire by taking money out of personal securities and investing it in the purchase of land. If that land when purchased is let to somebody else, the tenant for life is entitled to receive the rents.

I can see no distinction in principle in this respect between a tenant for life of land purchased under a direction in the will

(1) 4 D. M. & G. 448.

(2) 41 Ch. D. 532.

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and the tenant for life of land devised by the will itself. I do not think I am in any way extending the principle of *Powys v. Blagrove* (1) and *In re Cartwright* (2) by saying that it applies to this case.

Then there is the question, What is to be done about the repairs? What was pointed out in *In re Hotchkys* (3) as the right thing to be done is the right thing to be done here. The property ought to be kept in repair. As was pointed out there, it must be done by an equitable arrangement between the tenant for life and remainderman. I think the right thing to do in this case is this—that the money required for the repairs should be borne by capital; but of course the tenant for life will have to keep down the interest upon that capital. If the money is taken out of other personal estate, the tenant for life will get so much less income, because this investment will not produce income. If, on the other hand, the money is borrowed on mortgage for the purpose from some outside lender, the interest on that mortgage will have to be kept down by the income, and the tenant for life will have his or her income reduced by the provision which will have to be made to keep down the interest on the mortgage.

Solicitors for trustees: *Rooper & Whately*.

Solicitors for first mortgagees of life interest: *Ingle, Holmes & Sons*.

Solicitors for second mortgagees: *Emmet & Co*.

Solicitor for remaindermen: *Ernest Bevir*.

(1) 4 D. M. & G. 448.

(2) 41 Ch. D. 532.

(3) 32 Ch. D. 408.

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STIRLING J. LONDON AND NORTH WESTERN RAILWAY COMPANY AND GREAT WESTERN RAILWAY COMPANY v. RURAL DISTRICT COUNCIL OF RUNCORN.

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July 14, 15,  
16, 17, 20, 21;  
Nov. 23.

[1897 L. 672.]

*Local Authority*—"Sewer" or "Drain"—*Railway Company—Accommodation Works—Sewer made for Draining Land under Local or Private Act—Vesting in Local Authority—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 327.*

Drains constructed by a railway company under s. 68 of the Railways Clauses Act, 1845 (which Act was expressly incorporated in the company's special Act), for the purpose of conveying surface water from lands adjoining the railway were, without the knowledge or consent of the company, used to some extent to convey sewage from several houses within the district of a rural sanitary authority:—

*Held*, that, assuming these drains to have become sewers within the Public Health Act, 1875, they were sewers made and used for the purpose of draining land under a local or private Act of Parliament within the second exception in s. 13 of that Act, and consequently did not vest in the local authority.

Whether this exception would have applied if there had been no express incorporation of the Railways Clauses Act in the special Act, *quære*.

By the writ in this action the plaintiffs (the London and North Western Railway Company and the Great Western Railway Company) claimed an injunction to restrain the defendants "from connecting certain new sewers of the defendants in the township of Helsby and parish of Frodsham, in the county of Chester, with certain land drains and ditches of the plaintiffs, and from causing or permitting sewage or water to flow from the said new sewers of the defendants into the said ditches and land drains of the plaintiffs." There were no pleadings in the action. The question at issue was whether the land drains and ditches mentioned in the writ (which were constructed on their own lands by the plaintiffs or their predecessors in title) were now vested in the plaintiffs or (as the defendants alleged), under the provisions of the Public Health

Act, 1875, had become vested in the defendants as the rural sanitary authority of the district.

The plaintiffs were the successors of a railway company constituted by an Act of Parliament passed in 1846 (with which the Railway Clauses Act of 1845 was incorporated) for the purpose of making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway. This railway was made about the year 1850. Subsequently, by an Act of Parliament passed in 1861, it was, together with all the rights and obligations of the original company, transferred to the plaintiffs. The railway ran from Chester to Warrington in the direction from south-west to north-east, and passed near the village of Helsby, where there was a station. In the neighbourhood of Helsby the land on the south-east of the line sloped from a considerable height to the railway, which was constructed on an embankment. On the opposite side of the line the land was flat and marshy, and was locally known as "The Marshes." A little to the south of Helsby Station the plaintiffs were the owners of a strip of land on the south-east side of the line abutting on a field now in the occupation of the Helsby Cricket Club, hereinafter called the athletic field. This field was separated from the plaintiffs' property by a ditch, beyond which (and nearer the line) were a post-fence and a hedge. On the north-west side of the line the plaintiffs' property extended to a flash or pool of water formed by the excavation of the soil used in constructing the railway embankment. Between the railway and the flash was a second line of railway running from Hooton to Warrington, and between these two lines was a triangular space partly occupied by sidings and partly unused hitherto, but intended for the construction of accommodation works as the traffic developed. Previously to 1896 the athletic field consisted of two fields separated by a ditch which had since been filled up. At the north and south sides of the field were still existing ditches. These communicated by means of 9-inch pipes with a system of pipes and drains on the plaintiffs' land, and situate partly on the south-east and partly on the north-west of the line. All of them after passing under the first-mentioned railway ultimately

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STIRLING J. joined an 18-inch pipe which passed under the second line of railway and discharged into the flash or pool already mentioned. It was as to the ownership of this system of pipes or drains that the dispute arose. All these pipes or drains had been constructed by the plaintiffs or their predecessors in title. Those which lay on the south-east side of the first line, and which passed under it, were so constructed in 1850, at the time when that railway was originally made. Those which lay on the north-west side of the line had had their course and position altered from time to time to suit the requirements and convenience of the plaintiffs, and were now some eight or ten feet under the level of the ground. On the south-east side of the line the average gradient was 1 in 25. On the north-west it was only 1 in 107, and for a considerable portion of their course the pipes or drains on the latter (that is, the north-west) side were practically level. The ditches on the north and south sides of the athletic field, and also the ditch which formerly ran down the middle of it, were (apart from the user hereinafter referred to) ordinary country ditches, and, according to the evidence of the defendants, before the making of the existing line of railway were continued down to the marshes.

The defendants' case was that the ditches in the athletic field had been used for the purpose of carrying off the sewage from eight houses on the south-east side of the line; that this sewage passed from the ditches into the plaintiffs' system of pipes and drains; and that these pipes and drains had thereby become sewers within the meaning of the Public Health Act, 1875, and were vested in the defendants. Of these houses two only were in existence at the time when the railway was made. It appeared from the evidence that the drainage of two of these houses was from the year 1872 connected with the ditch on the north side of the athletic field; that the drainage of three others of them was from the year 1873 connected with the same ditch; that the drainage of the three remaining houses was from the year 1877 connected with the ditch which formerly ran down the middle of the field; and that this state of things continued up till 1896. It further appeared that during those periods a certain quantity of sewage found its way from all the

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houses along the two ditches into the pipes or drains on the plaintiffs' lands; but that this occurred without the plaintiffs' knowledge, and that there was nothing to affect them with notice.

In 1896 the ditch down the middle of the athletic field was closed with the assent of the defendants, and they then proceeded to convey the sewage into the ditch at the south of the field whence it passed into the pipes and drains on the plaintiffs' lands. This was objected to by the plaintiffs, and the defendants thereupon abandoned the use of the southern ditch and carried the sewage into that on the north side of the field. The object of this action was to restrain them from so doing.

*Hastings, Q.C.*, and *Shearman*, for the plaintiffs. The plaintiffs' complaint is that the defendants are sending sewage down ditches where the gradient is 1 in 25 into the plaintiffs' pipes, where the gradient is 1 in 100, and are thus causing a block in the pipes.

By the Railways Clauses Act, 1845 (1), which is expressly incorporated in the plaintiffs' special Act and forms part of it, a statutory duty is imposed upon the plaintiffs of maintaining these drains for the purpose of draining the surface water from the adjoining lands. At a subsequent date the Public Health Act of 1875 was passed, which by s. 13 provides for the vesting

(1) The material provisions of the Railways Clauses Consolidation Act, 1845, are as follows:—

Sect. 16: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works:—(that is to say) . . . They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway . . . and they may do all other acts necessary for making, main-

taining, altering, or repairing, and using the railway."

Sect. 68: "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say) . . . Also all necessary arches, tunnels, culverts, drains, or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be. . . ."

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STIRLING J. of sewers in the local authority; but these pipes were not made for the purpose of carrying sewage, and, even assuming that they constitute a sewer within s. 4 of the Public Health Act, 1875 (1), it is impossible for the plaintiffs to discharge their statutory duty if these pipes are to be vested in the defendants and used by them to convey the sewage of houses in their district. There being, therefore, a necessary inconsistency between the special and the general Act, the special Act must prevail over the general; and this principle applies equally whether the special Act or the general Act is passed first: *London and Blackwall Ry. Co. v. Limehouse District Board of Works* (2); *City and South London Ry. Co. v. London County Council* (3); *London County Council v. School Board for London*. (4)

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Secondly, these pipes fall either within the first or second exception in s. 13, and therefore do not vest in the local authority. The object of the Legislature in making the second exception, which is the one most applicable to the present case, was to avoid the clashing of different authorities. That object is emphasized by s. 327.

Thirdly, these drains are not a sewer within the Public Health Act, 1875. They were constructed to drain surface

(1) The material provisions of the Public Health Act, 1875, are as follows:—

Sect. 4: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigne to them; that is to say:—

\* \* \* \*

"'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"'Sewer' includes sewers and drains

of every description, except drains to which the word 'drain' interpreted as aforesaid applies," with a further exception not material to the present case.

Sect. 13: "All existing and future sewers within the district of a local authority . . . except (1.) sewers made by any . . . company for the profit of the shareholders; and (2.) sewers made and used for the purpose of draining preserving or improving land under any local or private Act of Parliament . . . shall vest in and be under the control of such local authority."

(2) (1856) 3 K. & J. 123.

(3) [1891] 2 Q. B. 513.

(4) [1892] 2 Q. B. 606.

water from lands adjoining the railway, not to convey sewage, STIRLING J. nor do they provide any outlet for the sewage; and the Public Health Act was not intended to enable a local authority by trespassing upon pipes made and used for a different purpose to confiscate the property of a private individual: *Meader v. West Cowes Local Board* (1); *Reg. v. Godmanchester Local Board*. (2)

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Lastly, the defendants cannot claim any right to use the plaintiffs' pipes for sewage under the Prescription Act, because it would be beyond the power of the plaintiffs to grant such right: *Proprietors of Staffordshire and Worcestershire Canal Navigation v. Proprietors of Birmingham Canal Navigations*. (3) The plaintiffs have no power to hold land except subject to the purposes of their special Act, and, being entrusted by Parliament with certain duties and powers, they cannot divest themselves of those duties and powers by any contract or grant which would have the effect of tying their hands: *Mulliner v. Midland Ry. Co.* (4); *Ayr Harbour Trustees v. Oswald*. (5) If the defendants are allowed to send sewage into these pipes, the plaintiffs cannot comply with the requirements of the Railways Clauses Act. It is immaterial whether these drains are to be treated as having been constructed for the purposes of the railway itself under s. 16, or for the accommodation of adjoining landowners under s. 68. In either case the plaintiffs are bound to maintain them and keep them in repair; and it is, therefore, essential that they should keep the control of them.

*E. P. Hewitt (Jelf, Q.C., with him)*, for the defendants. The defendants' case is that the ditch on the north side of the athletic field and the pipe under the railway and the continuation pipes down to the pool form a sewer. An open ditch may form a sewer or part of a sewer: *Wheatcroft v. Matlock Local Board* (6); *Falconar v. Corporation of South Shields*. (7) In *Reg. v. Godmanchester Local Board* (2), which is relied upon

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|---------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| (1) [1892] 3 Ch. 18.                                                                        | (3) (1866) L. R. 1 H. L. 254, 267.                                                             |
| (2) (1864) 5 B. & S. 886, 899, and<br>on appeal (1866) 5 B. & S. 936; L. R.<br>1 Q. B. 328. | (4) (1879) 11 Ch. D. 611, 622.<br>(5) (1883) 8 App. Cas. 623, 634.<br>(6) (1885) 52 L. T. 356. |

- (7) (1895) 11 Times L. R. 223.

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STIRLING J. by the plaintiffs, what was claimed as a sewer was not, as here, a narrow ditch with hardly any water in it, but a flowing brook fifteen feet wide, and five feet deep at its lower extremity, into which the drains of one or two houses emptied. In the present case this ditch received sewage matter from five houses. *Meader v. West Cowes Local Board* (1) is explained and distinguished by Lindley L.J. in *Hornsey Local Board v. Davis*. (2) Taking it as a fact that the ditch and pipes into which it flowed are a sewer, *prima facie*, they vest in the defendants under s. 13 of the Public Health Act. The case does not fall within the first exception to s. 13, as a sewer made for profit: *Acton Local Board v. Batten* (3); *Ferrand v. Hallas Land and Building Co.* (4) Nor does it fall within the second exception, as a sewer made for the purpose of draining, preserving, or improving lands under a local or private Act of Parliament. The Railways Clauses Act is not a local or private Act within the meaning of the section; nor is the company's private Act, even read with the Railways Clauses Act, the kind of Act to which the exception was intended to apply. The question of what Acts the exception applies to was discussed in *Reg. v. Godmanchester Local Board*. (5)

The argument that s. 13 is excluded because these drains were accommodation works which, under the Railways Clauses Act, the plaintiffs were bound to keep in repair is unsound. The Railways Clauses Act does not prevent a drain after it has become a sewer from vesting in the local authority. If and so far as there is an inconsistency between s. 13 of the Public Health Act and s. 68 of the Railways Clauses Act, the Public Health Act, as the later enactment, must prevail. The cases cited by the plaintiffs upon this point do not apply.

Again, the fact that the user of the pipes under the railway for sewage purposes may have originally been wrongful does not exclude s. 13 of the Public Health Act: *Falconar v. Corporation of South Shields* (6), *Reg. v. Vestry of St. Matthew*,

(1) [1892] 3 Ch. 18.

(2) [1893] 1 Q. B. 756, 765.

(3) (1884) 28 Ch. D. 283.

(4) [1893] 2 Q. B. 135.

(5) 5 B. & S. 886, 899, and on appeal 5 B. & S. 936; L. R. 1 Q. B. 328.

(6) 11 Times L. R. 223.

*Bethnal Green*. (1) *Meader v. West Cowes Local Board* (2) and *STIRLING J. Bateman v. Poplar District Board of Works* (3) are distinguishable.

The defendants' case does not rest on prescription, but on the effect of s. 13 of the Public Health Act. Accordingly, if the ditch and the drains are a sewer vested in the defendants, they have power to lay pipes down the ditch and to increase the amount of sewage flowing down the same: see s. 18 of the Public Health Act and *Falconar v. Corporation of South Shields*. (4) But the defendants admit that they must not cause a nuisance, and no question of nuisance arises in this action. The Legislature has considered it for the public benefit that sewers in the widest sense of the term should vest and be under the control of the local authority, even though it may involve an interference with the private rights of individuals: *Travis v. Uttley*. (5)

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*Shearman*, in reply. The cases cited by the defendants as shewing that these pipes are a sewer which has vested in the local authority are distinguishable, because they are cases in which the pipes were made for the purpose of draining houses. In considering the purpose for which these pipes were constructed, regard must be had to the state of things existing at the time when the pipes were laid down; and there is no evidence to shew that they were intended for any other purpose than to clear the adjoining lands of surface water.

*Cur. adv. vult.*

Nov. 23. *STIRLING J.*, having stated the facts and reviewed the evidence with the results already mentioned, continued as follows:—Before examining the provisions of the Public Health Act, 1875, on which the defendants rely, I think it desirable to consider what were the rights and obligations of the plaintiffs and their predecessors in title in respect of these drains and pipes under the special Act for constructing the railway and the general Acts incorporated therewith. The special Act contains nothing

(1) [1896] 2 Q. B. 95, and on appeal, 319.

(2) [1892] 3 Ch. 18.

(3) (1887) 37 Ch. D. 272.

(4) 11 Times L. R. 223.

(5) [1894] 1 Q. B. 233.

STIRLING J. in itself which directly relates to these drains; but there is  
 1897 incorporated with it the Railways Clauses Act, 1845, of which  
 LONDON AND two sections are material, namely, ss. 16 and 68. The former  
 NORTH relates to drains for the accommodation of the railway itself;  
 WESTERN the latter to drains for the accommodation of lands adjoining  
 RAILWAY CO. the railway. [His Lordship referred to ss. 16, 68, 69, and 73  
 v. of the Railways Clauses Act, and continued :—]  
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It seems clear that all drains constructed under either section were to remain under the control and management of the railway company. Some discussion took place at the trial as to the purpose for which the system of pipes and drains has been constructed by the plaintiffs or their predecessors. There is no direct evidence on the point, and it is obvious that a system of drainage such as now exists is necessary as well for the protection of the railway embankment as for the accommodation of the adjoining lands. The embankment of the plaintiffs must necessarily dam up the water (which in times of storm is of considerable amount) coming down the slopes to the south-east of the line, and the stability of the embankment might be endangered by reason of the great pressure if means were not taken to prevent the accumulation of water. At the same time, the embankment would probably throw back the water on the adjoining lands, and certainly would prevent the water from being conveyed away from those lands (in the language of s. 68) “as clearly as before the making of the railway.” It becomes, therefore, the duty of the railway company, under s. 68, to construct drains and other passages sufficient to convey away the water. Seeing that, according to the defendants’ own evidence, the ditches before the construction of the railway ran straight on to the marshes without any interruption, I cannot doubt that the pipes and drains were constructed for the purpose of fulfilling this statutory duty.

In the case of *Reg. v. Fisher* (1) it was held that the drains and other passages for the conveyance of water which the railway company is bound to provide are to be such as are required at the time when the land is taken, and not such as might be necessary at a subsequent date, when the land might be applied

(1) (1862) 3 B. & S. 191.



to uses of a totally different kind. This decision was followed STIRLING J. in the case of *Reg. v. Brown* (1), and has been recently approved by the Court of Appeal in the *Rhondda and Swansea Ry. Co. v. Talbot*. (2)

[His Lordship then reviewed the evidence as to the state of things existing at the time when the railway was made, and came to the conclusion of fact that these drains and pipes were not constructed for the purpose of carrying away sewage from any house, but were constructed (in the language of the Act of 1845) for the purpose of conveying the water "as clearly from the lands lying near or affected by the railway as before the making of the railway," and he continued as follows :—]

I now come to the provisions of the Public Health Act, 1875. [His Lordship referred to the definitions of the terms "drain" and "sewer" in s. 4, and to ss. 13, 15, 21, and 327.]

Now it is quite clear that the policy of this Act is that as regards sewers to which it relates they are to be vested in the local authority, and to be under their control; and under s. 21 the public within the district—that is to say, such of the public as are owners or occupiers of premises within the district—have certain rights given to them of making use of these sewers. The control and management, therefore, of such sewers as these are quite different from the control and management which is provided for by the Act of 1845.

It was admitted in argument on behalf of the defendants that, if the system of pipes and drains in the plaintiffs' land is a sewer within the meaning of the Act, the duty of maintaining and repairing it falls upon the defendants. The contention on behalf of the defendants may be stated as follows: the pipes and drains are at the present time, and were previously to 1896, used de facto for the drainage of more than one building only. Consequently they are sewers within the definition of s. 4, and are vested in the defendants under s. 13. To this the plaintiffs make several answers. It is said first that none of the owners of the houses in question had acquired against the plaintiffs any legal title to send sewage into these pipes and drains; that, according to the doctrine of *Mulliner v. Midland*

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(1) (1867) L. R. 2 Q. B. 630.

(2) [1897] 2 Ch. 131.

STIRLING J. *Ry. Co.* (1), approved in the House of Lords in the *Ayr Harbour Trustees v. Oswald* (2), it was competent for the plaintiffs at any time to put an end to the user which had taken place, and that the vesting under s. 13 does not put an end to this right. On this I was particularly referred to the case of *Reg. v. Godmanchester Local Board* (3), and more especially the observations of Cockburn C.J. (4), where a strong opinion was expressed that the Public Health Act of 1848 (the provisions of which were very similar to those of the Act of 1875 in this respect) was not intended to interfere with rights of a private nature. It is said, secondly, that the rights vested in the plaintiffs by their special Act for a specific purpose cannot be held to be overridden by a subsequent statute conferring upon a public body general powers for a different purpose, and on this I was referred to the case of the *London and Blackwall Ry. Co. v. Limehouse District Board of Works* (5), and the more recent cases of the *City and South London Ry. Co. v. London County Council* (6) and the *London County Council v. School Board for London*. (7) Thirdly, it was contended that the pipes and drains in question, if sewers within the Act, are "sewers made and used for the purpose of draining land under a local or private Act of Parliament," and consequently fall within the second exception of s. 13. I have come to a conclusion on this last point in favour of the plaintiffs; and this being so, it is unnecessary to express a concluded opinion on either of the other two. I may, however, say with respect to the first that, as at present advised, I am not satisfied that the plaintiffs' argument is consistent with the general scheme of the Public Health Act, 1875. It is well established by cases decided subsequently to that of *Reg. v. Godmanchester Local Board* (3) that the Public Health Act, 1875, does apply to sewers constructed by the owner of houses on his own land for the use of those houses, and consequently the Act does to some extent interfere with private rights. As regards the

(1) 11 Ch. D. 611.

(2) 8 App. Cas. 623.

(3) 5 B. &amp; S. 886, 936; L. R. 1 Q. B. 328.

(4) 5 B. &amp; S. 899.

(5) 3 K. &amp; J. 123.

(6) [1891] 2 Q. B. 513.

(7) [1892] 2 Q. B. 606.

second, although the rule as to construction of statutes which is relied on is well established, still it is one which yields to indication of contrary intention.

Now, s. 13 of the Public Health Act, and also the definition in s. 4, shew apparently that the Legislature contemplated that the provisions of that section might possibly affect sewers which had been brought into existence under prior legislation, for there are excepted from the operation of the very wide terms of the enacting part a class of sewers made under the authority of certain Acts of Parliament, and I am not at present satisfied that other sewers of a different statutory origin were meant to be exempted.

I have already stated that in my opinion the drains and pipes in question were constructed for the purpose of conveying the water from the lands lying near or affected by the railway as clearly as before the making of the railway, or in other words, for the purpose of conveying away the water which, as matters stood when the railway was constructed, did or might find its way into the ditches which intersected the land adjoining the line. The object of those ditches was to drain that land. I think, therefore, that the pipes and drains were made for the purpose of draining the land through which these ditches ran; and they have ever since been used for that purpose; and the adjoining owners have the right to insist as against the railway company that they shall continue to be so used.

It was said, however, that they were not made under a local or private Act of Parliament, but under a general statute, namely, the Railways Clauses Act, 1845. On this point reference was made to s. 1 of the Act. [His Lordship read the section, and continued:—]

Now, it is to be observed that the special Act under which the railway was constructed does in terms incorporate the Act in question. That special Act must, therefore, as it seems to me, be read as if the provisions of the Railways Clauses Act, 1845, had been repeated verbatim in it; and I think that these pipes and drains were under these circumstances made under this special Act.

But it was further said that the plaintiffs' special Act, being

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 1897 Parliament as is contemplated in s. 13, sub-s. 2, or in s. 327,  
 LONDON AND sub-s. 1. Now, the language of the Act is "sewers made and  
 NORTH used for the purpose of draining, preserving, or improving land  
 WESTERN under any local or private Act of Parliament." This conten-  
 RAILWAY CO. tion seems to me to be based on a transposition of the language,  
 v. and to deal with the Act as if it ran in this form: "Sewers  
 RUNCORN made or used under any local or private Act of Parliament for  
 RURAL draining, preserving, or improving land." I see no sufficient  
 COUNCIL. reason for making any such transposition; and I think there  
 ————— may have been good reasons on the part of the Legislature for  
 excepting sewers made for the purpose of draining land under  
 any local or private Act of Parliament, even although the  
 object of that Act of Parliament was not the draining, preserving,  
 and improving the land, but was some other object.

I think, therefore, that the contention of the defendants is  
 not well founded, and that the plaintiffs are entitled to judgment  
 in their favour.

Solicitors: *C. H. Mason; Preston, Stow & Preston, for  
 Ashton, Runcorn.*

H. B. H.

## PAGET v. PAGET.

KEKEWICH  
J.

[1896 P. 810.]

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*Married Woman—Separate Estate—Restraint on Anticipation—Husband's Debts—Exoneration—Indemnity against Husband or his Estate—Order removing Restraint—Practice in Chambers—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.*

A wife's equitable right of indemnity for loss incurred by her contributions out of her separate estate towards payment of her husband's debts arises equally against her husband if living as against his estate if dead (p. 54).

Where a wife's life interest under a settlement has been made available for raising money for payment of her husband's debts by means of relief from her restraint on anticipation by an order of the Court under s. 39 of the Conveyancing and Law of Property Act, 1881, the husband is not liable, at the suit of the wife, to indemnify her or her separate estate against her contributions towards payment of his debts (p. 57).

Observations on applications in chambers under s. 39 of the above Act.

At the date of the marriage, in January, 1877, of the plaintiff Lucy Annie Emily Paget with the defendant Gerald Cecil Stewart Paget, the plaintiff was entitled under the will of her grandfather, Robert Gardner, to receive during her life, for her sole and separate use and without power of anticipation, the net residue of the annual income (after certain payments) of a moiety of certain warehouses in Manchester, and of a sum of 100,000*l.*, or of the investments representing the same.

By a settlement dated January 1, 1877, and made on the marriage of Mr. and Mrs. Paget, two sums of 10,000*l.* and 5000*l.*, to which Mr. Paget was entitled subject to the life interests therein of his father and mother, were settled upon trust for him during the joint lives of himself and Mrs. Paget, and after the death of either for the survivor during his or her life, and, after the death of the survivor, for the issue of the marriage, and, in default of issue, for Mr. Paget absolutely.

By another settlement made upon the marriage, Mrs. Paget settled a sum producing about 2000*l.* per annum upon Mr. Paget for his life or until bankruptcy or alienation, and after



KEKEWICH the cesser of such life interest upon herself for life, with  
J. remainders over.

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In March, 1878, Mr. Paget borrowed 15,000*l.* from Mrs. Paget's sister on the security of a bond. In June, 1878, that sister married Lord Charles Beresford, and subsequently, on November 9, 1878, Mr. Paget executed to Lord Charles Beresford a mortgage securing the 15,000*l.* with interest at 5 per cent. upon two policies of assurance on his (Mr. Paget's) life for 4000*l.* and 11,000*l.* each, and of his reversionary interests under his first marriage settlement.

In 1882 the joint income of Mr. and Mrs. Paget amounted to some 8000*l.* a year, of which 5500*l.* a year belonged to Mrs. Paget under her grandfather's will ; but they had for some time past been living much beyond their income, and their debts, the greater part of which appeared to have been incurred by the husband alone, amounted in that year to 47,050*l.*

In that year, in order to clear off the most pressing of those debts, Mr. and Mrs. Paget, through their then solicitors, Messrs. Parkers, negotiated with the North British and Mercantile Insurance Company for a loan of 23,000*l.* on the security of Mrs. Paget's life interest under her grandfather's will and a policy on her life. In order to carry out the transaction, Mrs. Paget, by her next friend, took out an originating summons before Chitty J. to be relieved from her restraint on anticipation under s. 39 of the Conveyancing and Law of Property Act, 1881, which provides that, "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

The application was supported by an affidavit by Mrs. Paget prepared by Messrs. Parkers, and also by an affidavit by William Searle Parker, a member of the firm. In Mrs. Paget's affidavit the whole of the debts were set out in detail, but no distinction was made between the debts properly attributable to herself and her husband respectively, the whole being repeatedly referred to as "our debts" or "our indebtedness." Mr. Parker's affidavit also went minutely into the financial position of Mr. and Mrs. Paget, stating that the application was made

at the request of Mrs. Paget, with whom alone he had discussed the matter, and that, in his belief, unless the application was granted, Mr. and Mrs. Paget's establishment would be broken up and Mr. Paget driven into bankruptcy, and both would forfeit their social position. Thereupon, on June 28, 1882, Chitty J. made an order in chambers which, after expressing an opinion that the arrangement thereafter mentioned would be for the benefit of the applicant, directed that the 23,000*l.* then proposed to be advanced to her by the North British and Mercantile Insurance Company should, when advanced, be charged upon her life interest and a policy on her life, together with interest and premiums, the principal sum not to be paid until her death, unless she desired to pay it or any part of it during her life.

As the result of that order, a mortgage was executed on July 24, 1882, by Mr. and Mrs. Paget to the North British Company, whereby Mrs. Paget's life interest and a life policy were assigned to the company by way of mortgage for securing 23,000*l.* therein expressed to be advanced by the company to Mrs. Paget, with interest and premiums, the covenant for repayment being entered into by Mr. Paget and also by Mrs. Paget with intent to bind her separate estate. By the direction of Mr. and Mrs. Paget, or one of them, the 23,000*l.* was handed to Messrs. Parkers for the purpose of being applied in discharge of the debts for which it had been raised, and the greater part of it was so applied; but in March, 1884, the Messrs. Parkers absconded and were made bankrupt, when it was discovered that of the 23,000*l.* a sum of nearly 4000*l.* had been applied by them to their own use. To make up the deficiency, and at the same time to provide a fund for payment of further debts of Mr. and Mrs. Paget, Mrs. Paget, on August 11, 1887, obtained a further order from Chitty J. in chambers, under s. 39 of the Conveyancing Act, enabling her to charge, notwithstanding her restraint upon anticipation, her life interest, and also another life policy with a sum of 22,000*l.* and interest, subject to the existing mortgage to the North British Company, in favour of the Pelican Life Insurance Company. That application was supported by an affidavit by Mrs. Paget, and by her and her husband's then solicitor, to the same effect as before. On this

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KEKEWICH occasion Chitty J., before making the order, saw and questioned J. Mrs. Paget herself. The charge in favour of the Pelican Office was effected by a mortgage by Mrs. Paget alone to the office of 1897 her life interest and her further policy to secure the 22,000*l.* PAGET therein expressed to be advanced to her, with interest and v. premiums, but subject, as to the life interest, to the prior mort- PAGET. gage to the North British. The 22,000*l.* was duly received by Mrs. Paget, and applied by her in discharge of debts, including the balance of the 15,000*l.* due to Lord Charles Beresford (part of which had been repaid out of the proceeds of the 11,000*l.* policy, which had been surrendered), who thereupon reassigned to Mr. Paget his 4000*l.* policy and his reversionary interests in 10,000*l.* and 5000*l.* comprised in the security of November 9, 1878. By a deed of September 28, 1889, that 4000*l.* policy was assigned by Mr. Paget to the trustees of the secondly above-mentioned marriage settlement upon trusts for making good part of the trust funds which had been lost by the frauds of the Messrs. Parkers, and subject thereto, for Mr. Paget absolutely. The mortgages for 23,000*l.* and 22,000*l.* were still subsisting. In May, 1893, Mr. Paget left his wife and had since lived apart from her. Since that date Mrs. Paget had out of her own income paid the interest under the two mortgages and had, as she alleged, paid various other sums of money on behalf of her husband.

On April 2, 1896, Mrs. Paget, suing in respect of her separate estate, issued the writ in this action against her husband, claiming (1.) a declaration that he was liable to indemnify her against the mortgages of 1882 and 1887, and the principal sums of 23,000*l.* and 22,000*l.* and interest thereby respectively secured; (2.) payment of those two principal sums and of the interest alleged to have been paid by her out of her separate estate since the separation in May, 1893; (3.) repayment of further sums alleged to have been paid by her out of her separate estate since the separation towards satisfaction of debts or liabilities of the defendant or otherwise on his account; (4.) a declaration that she was entitled to a charge upon all the interests of the defendant in the two trust funds of 10,000*l.* and 5000*l.* and in his 4000*l.* policy, for the amount of the mortgage

debt of 15,000*l.* and interest repaid to Lord Charles Beresford ; KEKEWICH and other incidental relief.

In his defence the defendant alleged that the plaintiff adopted and treated as part of her own indebtedness and voluntarily paid the whole of the debts and liabilities to the discharge of which the 23,000*l.* and 22,000*l.* had been applied, and was estopped from asserting that they were debts or liabilities of the defendant alone, and from claiming any payment or indemnity from him. He also pleaded the Statutes of Limitations as a bar to the plaintiff's claim. He also counter-claimed for part of a sum of 3000*l.*, alleged to have been borrowed by him from a firm of bankers on two promissory notes, and which part he said he had paid to her as his agent for a specific purpose which she had not fulfilled.

The action now came on for trial.

At the trial the defendant withdrew his counter-claim, which was accordingly dismissed with costs.

Mrs. Paget, who was called as a witness, insisted that her affidavits in support of her applications in 1882 and 1887 were incorrect in describing the debts as "our debts" or "our indebtedness," and that, on the contrary, the greater part of the debts was attributable exclusively to her husband, though she admitted that a considerable portion represented the expenses of the joint establishment.

Mr. Paget was not called as a witness.

*Renshaw, Q.C., Carson, Q.C., and A. a'B. Terrell*, for the plaintiff. We base our claim to relief on the well-established rule of equity that where a wife's estate is mortgaged or pledged for the benefit of her husband, as by paying his debts, she, being in the position of surety, is entitled to be exonerated from or indemnified against those debts by his estate if he is dead ; and if he is living it seems to follow, though there seems to be no express decision on the point, that she is entitled to be indemnified by the husband himself. The leading authority upon the rule is *Earl of Huntingdon v. Countess of Huntingdon* (1), discussed in *White and Tudor's Leading Cases in Equity*,

(1) (1702) 2 Bro. P. C. 1.

KEKEWICH 6th ed. vol. ii. p. 1147, et seq., where all the cases on the subject are collected. The rule is equally applicable whether the wife's estate is settled to her separate use or not: *Aguilar v. Aguilar* (1); *Hudson v. Carmichael*. (2) The circumstance that the applications to Chitty J. under s. 39 of the Conveyancing and Law of Property Act, 1881, treated the indebtedness as that of both husband and wife, does not prevent the wife from now shewing that the sums were raised out of her separate estate in order to pay what were in fact debts of the husband.

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[KEKEWICH J. Is there any authority that a husband can be ordered to indemnify the wife against her contributions to the joint debts where those contributions have been ordered by the Court ?]

No; this is the first case upon the point. But the orders made by Chitty J. were merely orders made under the special jurisdiction conferred by s. 39 of the Conveyancing and Law of Property Act, 1881, enabling the Court to relieve a married woman from her restraint on anticipation, on being satisfied that it will be for her benefit. An order under that section never deals with the question of the ultimate responsibility of the husband, for that is not the question before the Court upon the application, nor is there any jurisdiction to deal with the question at all upon an application under that section, the husband not being a party. Therefore the husband's liability in this case must be treated as left open by the orders, and we submit that the well-settled equitable rule applies.

*Lawson Walton, Q.C., Warrington, Q.C., and J. Henderson*, for the defendant. Assuming, for the sake of argument, that the right, if any, that vested in Mrs. Paget when the orders of Chitty J. in 1882 and 1887 were made was a right of indemnity, that right depended upon an implied assumpsit arising from the nature of the transaction and rebuttable by evidence; and if the evidence shews, as we submit it does, that Mrs. Paget has, in respect of her separate estate, treated the indebtedness as her own as well as her husband's for all this length of time, and paid the debts without any suggestion until now that she

(1) (1820) 5 Madd. 414.

(2) (1854) Kay, 613.



was entitled to any exoneration or indemnity, then she must be regarded as having waived her right, and she is therefore now barred by s. 3 of the Statute of Limitations (21 Jac. 1, c. 16). That the waiver by the wife of her right may be proved by parol is clear: *Clinton v. Hooper*. (1) If, then, the wife has adopted the debts as her own, the equitable rule as to exoneration no longer applies; and certainly there is no case to be found in the books in which the wife's equity has been asserted during the life of her husband. Nor is there any reported instance in which a wife has attempted to assert her equity after an order of the Court has been made, on her application, enabling her to pay her husband's debts, and without reserving her equity. The order operates as an estoppel, or it is in the nature of an estoppel, against the wife seeking an indemnity from the husband for debts of his which she herself has agreed to pay. It would be unjust now to allow this lady after all these years to change her mind and effect her husband's ruin by obtaining a judgment for indemnity against him. No doubt the decided cases shew that, if there is nothing more than a mortgage of the wife's estate to secure a debt of the husband already incurred, then, in the absence of anything to the contrary, the inference is that the husband is the principal debtor and the wife is in the position of surety, and she has a right of indemnity accordingly, but only in the administration of his estate; there is no authority that the right can be enforced during the husband's lifetime. Extrinsic evidence is always admissible to shew that the equitable obligation to indemnify ought not to be implied from such a mortgage. Now, on the face of the two mortgages in this case, there is no lending to the husband: the money is in express terms lent to the wife; and therefore there cannot be such an inference of the obligation to indemnify as might arise if the loan had been to the husband. If it is said that the mortgage by the husband and wife in 1882 leads to the inference that the loan was to the husband, that inference may be disproved by circumstances, and it may be shewn by extrinsic evidence that the loan was, in fact, for the benefit of the wife: *Hudson v. Carmichael* (2);

(1) (1791) 1 Ves. 173, 185; 3 Bro. C. C. 201.

(2) Kay, 620.

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KEKEWICH *Clinton v. Hooper*. (1) And we submit that the extrinsic evidence negatives the idea of any implied obligation on the part of the husband to indemnify the wife, or that the loan was otherwise than for the benefit of the wife equally with the husband.

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*Renshaw, Q.C.*, in reply. This is not a case of implied assumpsit as between man and man, but a question of intention as between husband and wife as regards dealings with the wife's estate. In *Clinton v. Hooper* (1) there was an express waiver by the wife, the case turning on this, that the waiver by the wife took place after the death of her husband. Here the wife cannot waive her equity, by reason of her being restrained from anticipation. *Pawlet v. Delaval* (2), which is commented on in *Milnes v. Busk* (3), is an even stronger case than *Clinton v. Hooper*. (1) As to the Statute of Limitations, if Mrs. Paget is a surety, the suretyship arises every time she pays anything on account of the principal debtor; and she has been paying interest on the mortgage debts down to the present time. Her right to relief is therefore not barred.

*Cur. adv. vult.*

Nov. 16. KEKEWICH J. The doctrine that a wife is entitled to be indemnified by her deceased husband's estate, or as it seems to necessarily follow, by her husband living, against loss incurred by her contributions towards payment of his debts, is too well established to need exposition. And there is no occasion to discuss the questions discussed in Lord Hatherley's judgment in *Hudson v. Carmichael* (4) and elsewhere how far this doctrine depends on an implied assumpsit, or what are the limitations of the wife's rights as against the husband's creditors. Suffice it to say that the right is necessarily based on the matrimonial relations, and that, whether or not she is to be regarded strictly or for all purposes as surety for him, that may with reasonable accuracy be defined to be her position for the present purpose. What falls to me to decide is whether

(1) 1 Ves. 173, 187; 3 Bro. C. C. 201.

(2) (1755) 2 Ves. Sen. 663.

(3) (1794) 2 Ves. 488, 499.

(4) Kay, 613.

this doctrine is applicable to a case like the present, where the wife's contributions have been made, not by means of a gift from her operating by legal process such as a fine or by an assignment of her separate estate, but resort has been had to the powers conferred on the Court by the Conveyancing and Law of Property Act, 1881, s. 39, which enables the Court to relieve a married woman from restraint on anticipation where it appears to the Court to be for her benefit so to do. This jurisdiction, which to me causes more anxiety than any other that a judge is called upon to exercise, requires minute and careful examination of all the facts and circumstances. It is the duty of a judge considering an application of this character to inquire, not merely how it has come to pass that money is wanted, who is responsible for that result, and who is liable for debts already incurred, but also to what extent and in what manner benefit will be secured to the wife by granting the application, and what, if any, conditions can be reasonably and properly imposed. Regarding the restraint on anticipation as intended for the protection of the wife, I view these applications with extreme jealousy; and when they are occasioned, as is often the case, by the husband's extravagance, I never grant them unless satisfied that the wife's happiness will be seriously endangered by refusal or will really be advanced by such order as is asked. And more than this, I am extremely careful to provide that the scheme submitted, whatever it may be, is so carried out as to secure the intended benefit as far as written provisions can secure it; and I always exact the strictest conditions which seem to me to be capable of fulfilment. For instance, where it is desired to clear off debts incurred by a style of living in excess of the matrimonial income, as, for example, by maintaining an over-large establishment, I insist, if it be feasible, on removal to a smaller house or on a reduction otherwise of outgoings. I have been obliged to illustrate the exercise of the jurisdiction by reference to my own practice, because these applications are almost invariably disposed of in chambers, and the practice of other judges is not made public; but I believe that although other judges may treat as of first importance circumstances which, in my opinion, fall into the

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KEKEWICH second rank, and on the other hand give prominence to some  
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 1897 applications and endeavour to regard each and every of them  
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 PAGET from the one standpoint distinctly indicated by the statute,
 v. that is, the benefit of the wife. When, therefore, the Court
 PAGET. is required to consider what is the effect of an order relieving a
 ——— wife from restraint on anticipation and thereby enabling her
 to raise money with the assistance of a policy of assurance on
 her life or otherwise, and what are the consequences following
 from such order, I am bound to conclude that the order was
 made for her benefit; and that, whether or not the money could
 have been raised or could have been applied in any different
 manner or subject to any different conditions or restrictions,
 the judge who made the order was convinced that on the whole
 it was better for the wife that the end should be achieved in
 the manner provided in preference to any other.

The orders of June 28, 1882, and August 11, 1887, were made without imposing on Mr. Paget any obligation to surrender the life interest provided for him by the second marriage settlement; and except that one policy was brought into settlement for the express purpose of recouping to the settlement the loss occasioned by Messrs. Parkers' fraud, no conditions were imposed. It was not suggested on either application that Mr. Paget's life interest should be touched; but the existence of that life interest was disclosed, and I am bound to conclude that the learned judge who made the orders, and who on the second occasion we know went into the case thoroughly and to the extent of seeing Mrs. Paget privately, determined that it was more for her benefit that this life interest should not be surrendered, and that no other condition should be imposed.

It is argued that the contributions which she made by means of the relief of restraint on anticipation, and which could not otherwise have been made at all, were only made by her as surety for her husband, and that he is now bound to indemnify her as principal, and to make liable towards that indemnity the life interest which was left unaffected by the orders themselves. I say nothing about the time which has elapsed since the orders were made. If the plaintiff is right she could have

insisted on her rights as surety immediately after their respective dates; but I do not pause to inquire whether she has forfeited such rights, if any, as she had by delaying her action until the present time. I prefer to rest my judgment on the broad ground that, where the wife's life interest has been made available for raising money for payment of her husband's debts by means of relief from the restraint on anticipation under the sanction of the Court, it is inconceivable that she intended, or that the Court intended, that she should have a remedy over against him not reserved by the order giving such sanction, or that a doctrine flowing from the relation of husband and wife, and called into operation by her action independently of the Court, should be thus extended. I do not think that in a case of this kind, and bearing in mind that the wife's life interest has been largely taken to pay the husband's debts, it would be right to make her pay his costs, and therefore I dismiss her action without costs. The counter-claim, which was not arguable and was not argued, has already been dismissed with costs.

Solicitors: *Leman & Co.; Dawes & Sons.*

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MUDDOCK v. BLACKWOOD.

[1896 M. 3222.]

Copyright—Book—Piracy—Infringement—Action on the Case—Detinue—Trover—Combining Causes of Action—Limitation of Actions—Damages—Proceeds of Conversion—Profits—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 15, 23, 26—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

A proprietor of copyright in a book who has a remedy for infringement by “a special action on the case” under s. 15 of the Copyright Act, 1842, is not precluded from suing the offender, if he thinks fit, under s. 23, either in detinue or in trover, or, if necessary, in both combined; and all the remedies under both sections may be pursued by action in the Chancery Division.

In an action for infringement by a proprietor of copyright in a book, where the defendant had still in his possession some of the infringing copies and had sold others but without making any profits on the sales:—

Held, that the plaintiff was entitled, in addition to the usual injunction, to delivery-up of the copies in the defendant’s possession and to damages representing the actual amount of the proceeds of the copies sold.

THE writ in this action was issued on November 2, 1896, by the plaintiff James Edward Muddock, the author of, and the registered proprietor of the copyright in, a work called “A Wingless Angel,” against the defendant James Blackwood, a publisher, claiming an injunction, an account of profits, and delivery-up of copies, in respect of a work published by the defendant under the same title, and being, in fact, a reprint of the plaintiff’s work. On December 10 the defendant wrote to the plaintiff, offering to submit to an injunction to pay 10% as damages, to deliver up all copies in his hands, and to pay the plaintiff’s costs as between party and party. The plaintiff, however, refused the offer, and on December 18 made a demand in writing on the defendant, under s. 23 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), for all copies of the book unlawfully printed or imported; and then on December 23, 1896, issued a writ in the Queen’s Bench Division against the same defendant

claiming damages for wrongful conversion of copies of the book KEKEWICH J. 1897 MUDDOCK v. BLACKWOOD. unlawfully printed without the consent of the plaintiff. Then the plaintiff delivered a statement of claim in that action, and on February 1, 1897, obtained an order in chambers in that action transferring it to the Chancery Division, but expressly reserving the costs of that action to be dealt with by the Chancery judge at the trial. On February 8, Kekewich J., on the plaintiff's application, made an order for the two actions to be consolidated and to proceed as one action, and in the consolidated action the plaintiff delivered a statement of claim, claiming an injunction, delivery-up of all copies in the defendant's possession, an account of profits, or, alternatively, damages in respect of the infringement, with an inquiry as to the amount thereof, 250*l.* damages for conversion, as in an action of trover, and costs. It appeared that the plaintiff had not published any copies of his work since 1875; that in 1886 the defendant bought the stereotyped plates of the work at an auction sale, and had used them without objection until last year. An account furnished by the defendant to the plaintiff shewed that in 1886 he sold 1,010 copies at a total price of 38*l.* 19*s.* 9*d.*, and at a profit of 8*l.* 10*s.* 4*d.*; also that in 1896 he sold 29 copies at a profit of 1*l.* 4*s.* 2*d.*, his total profits on the sales thus amounting to 9*l.* 14*s.* 6*d.*; but that, after taking into account the purchase of the plates and repairs, amounting altogether to 10*l.*, there had been a net loss, on production and sale of the book, of 5*s.* 6*d.*

This was the trial of the action.

Warrington, Q.C., and *J. G. Joseph*, for the plaintiff. There has unquestionably been an infringement, and the relief we claim is, first, an injunction; secondly, damages, under s. 23 of the Copyright Act, 1842 (5 & 6 Vict. c. 45) (1), for the tortious

(1) The following sections were referred to in the course of the argument:—

Sect. 15: "If any person shall, in any part of the British dominions, after the passing of this Act, print

or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so

KEKEWICH conversion of infringing copies by the defendant; and thirdly,
 J. delivery-up, under the said section, of the copies now remaining
 1897 in the defendant's hands. The only real question is, what
 MUDDOCK should be the measure of damages for conversion under s. 23?
 v. We submit that we are entitled to damages for the copies sold
 BLACKWOOD. and not delivered up; that the measure of damages should be
 the actual sale price of the copies sold, and not merely the
 amount of profits on the sales; and that therefore the 10%
 offered by the defendant is wholly insufficient.

Renshaw, Q.C., and J. W. Baines, for the defendant. We submit that the plaintiff has misconceived his remedy. He is wrong in proceeding under s. 23, for that section gives a remedy only against a man who is in possession of a pirating book, and who is not the actual committer of the piracy. The section is really directed against a person who, it may be, is the innocent possessor of the pirating book; and that this seems to be the right view is shewn by the fact that the section requires that, before any proceeding is taken against the possessor, he should have notice, by a formal demand in writing, that the book in his possession is claimed to be a piracy. The section dealing with the actual committer of the piracy is s. 15 (1), and it

having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of record in that part of the British dominions in which the offence shall be committed"

Sect. 23: "All copies of any book wherein there shall be copyright, and of which entry shall have been made

in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such; and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover."

(1) *Ante*, p. 59, n.

is under that section that the plaintiff here should have proceeded.

Again, assuming that the plaintiff is right in proceeding under s. 23, he is wrong in his form of action, for he must select one or other of the two alternative forms of action provided by the section, that is, he must sue either in detinue, "or" in trover, not, as he has done, in both. The remedies given by the section are not cumulative. Where the Legislature intends the remedies for infringement to be cumulative, it expressly says so, as in s. 11 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), which provides that the owner of copyright may recover damages by special action on the case "in addition to" the remedies given by the Act for the recovery of penalties and for forfeiture. If the plaintiff here had sued, as he should have done, under s. 15 of the Act of 1842, his remedy would have been by special action on the case, which might have been brought in the Chancery Division.

Then as to the measure of damages under s. 23: all the damages the plaintiff can claim are the net profits the defendant has made by the sale of the book; he cannot claim the gross proceeds: *Pike v. Nicholas* (1); *Colburn v. Simms* (2); *Delfe v. Delamotte*. (3) And it is proved here that so far from making a profit by his sales, the defendant has made a loss. Moreover, the plaintiff's remedy is barred by time, under s. 26, at all events as regards the sales in 1886.

Upon the question of costs, the plaintiff need only have brought one action, and that in the Chancery Division: as he has chosen to indulge in a "multiplicity" of actions, he cannot in any case be entitled to more than the costs as of an action in the Chancery Division. Moreover, since the defendant offered before action all that the plaintiff was justly entitled to, he might have obtained all necessary relief by a simple summons in chambers in the Chancery Division, and he should be allowed only the costs as on such a summons: *Allen v. Oakey*. (4)

Warrington, Q.C., in reply.

(1) (1869) L. R. 5 Ch. 251, 260.

(2) (1843) 2 Hare, 543, 560.

(3) (1857) 3 K. & J. 581.

(4) (1890) 62 L. T. 724.

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As to the measure of damages, we ought to have the total sum realized by the defendant by sales in 1886 and 1896 plus a sum for profits. The precise amount of damages I will leave to your Lordship. Then we should have the copies now remaining in the defendant's possession delivered up, and the usual injunction should form part of the order. There is no ground for depriving the plaintiff of costs occasioned by the defendant's wrong-doing.

KEKEWICH J. Two points are raised in this case. First, it is said on behalf of the defendant that s. 15 of the Act 5 & 6 Vict. c. 45, gives the proprietor of copyright a remedy by a special action on the case; that this is accordingly the remedy which he is intended to pursue, except so far as his remedies at common law are not interfered with; and that therefore s. 23, which gives certain specified rights of action to the registered proprietor, must be construed to mean something entirely different in this way, namely, that the offender under s. 23 is a different person from the offender under s. 15; that under s. 15 I am dealing with a person who has unlawfully printed or imported and sold, published or exposed for sale or hire, or has in his possession, for sale or hire, any book so unlawfully "printed or imported"; and that the other section, the 23rd, is a section providing a remedy against the accidental possessor of the infringing book, thus giving a right of action against the accidental possessor independently of his being otherwise a wrong-doer.

No doubt, there are words in s. 15 which are not to be found in s. 23. In the latter section the infringing book is treated as having been unlawfully printed or imported, but there is no reference to the actual printing or importing, the object of the section being to indicate the party who is to be sued; whereas s. 15 expressly enacts that the "printing or importing" of an infringing book shall be an offence, and you cannot possibly sue under that section any one except the person who has done one of those unlawful acts.

I am unable to suggest why these two sections should not have been put into one, or why they should have been separated as they are. But, on the other hand, I do not see why, because the proprietor of copyright has a remedy under s. 15 against the wrong-doer, therefore he cannot sue the wrong-doer, if so advised, under s. 23. If that was the intention of the Legislature, it is not adequately expressed.

The next point is this. The book being vested in the registered proprietor of the copyright, s. 23 says that, as to any infringing copies, he "shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover." That is an alternative remedy, and the argument on behalf of the defendant is that the plaintiff who claims to sue under that section must elect to sue either in detinue or in trover, and cannot sue in both. This is an easier question than the other. It would be an extremely narrow construction of the Act to say that the proprietor of copyright, knowing that a person has a certain number of copies in his hands and has sold others, cannot sue in respect of those which are retained and also in respect of the copies that have been converted to the wrong-doer's own use. It seems tolerably plain on the Act itself that it was the intention of the Legislature that the two actions might be reduced into one action distributed in the way I have suggested—that is to say, the plaintiff suing in detinue in respect of the copies the defendant has retained, and suing in trover in respect of the copies sold and converted to the defendant's own use.

Having got so far, it appears to me that the plaintiff, who is the registered proprietor of the book called "A Wingless Angel," is entitled to sue under s. 23, and to sue the defendant under that section, notwithstanding that he, the plaintiff, might have brought what is called "a special action on the case" under s. 15; and he might have exercised his privilege of bringing an action on the case by proceeding in the Chancery

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KEKEWICH Division. What, then, is the plaintiff's remedy? In my
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opinion he is entitled to the delivery-up on oath of all books in the defendant's possession, as in an action of detinue; and to damages, as in an action of trover, for the books the defendant has sold. The defendant has sold twice. In 1886 he sold 1010 copies, which realized 38*l.* 19*s.* 9*d.*, or say, 39*l.* He then republished the work again in 1896 and sold twenty-nine copies, making a profit of 1*l.* 4*s.* 2*d.*, which, on his own shewing, is rather more than one-eighth of what he made on the 1010 copies in 1886. He therefore got rather more profit on an average on the second occasion than on the first. I decline to order an inquiry. It would be almost wicked to send the case to the master or to the official referee to find the amount of damages for conversion, and if necessary I should have the inquiry before myself; but as Mr. Warrington has left it to me to fix a sum, it appears to me that a sum of forty guineas for the whole amount of the sales will give the plaintiff as much as he is entitled to, and there will be an order for payment of that sum; and for delivery-up of the copies in the defendant's possession. The plaintiff is also entitled to an injunction as part of the order.

[Upon the question of costs, his Lordship said that the plaintiff might have obtained all the relief he had sought by one action brought in the Chancery Division. The defendant had done his very best to avoid litigation, and had made a fair offer; but the plaintiff seemed to have been determined to multiply costs in every possible way. He should, therefore, have the costs as of a single Chancery action only; the costs of the other proceedings, including the costs of the transfer of the Queen's Bench action to the Chancery Division, he must be ordered to pay.]

Warrington, Q.C., suggested that s. 26 of the Copyright Act, 1842—which enacted “that all actions, suits, bills, indictments, or informations for any offence that shall be committed against this Act, shall be brought, sued, and commenced within

twelve calendar months next after such offence committed, or else the same shall be void and of none effect"—had since been wholly or partially repealed by s. 2 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). (1)

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Solicitors for plaintiff: *E. Salaman, Fort & Co.*

Solicitors for defendant: *Richardson & Goring Thomas.*

(1) By s. 1 of this Act, prosecutions or other proceedings "commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default" in any such execution, must be commenced within six months after the cause of action. By s. 2, combined with the schedule, a number of enact-

ments, and among them s. 26 of the Copyright Act 1842, are repealed so far as they enact that "in any proceeding to which this Act applies" . . . (inter alia) "the proceeding is to be commenced within any particular time." In the particular case the result, so far as the Act may be applicable, would seem to be to substitute the shorter limitation of six months for the original longer one of twelve.—F. P.

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ROMER J.

ATTORNEY-GENERAL *v.* TEDDINGTON URBAN
DISTRICT COUNCIL.

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Nov. 9, 10, 11.

[1896 A. 729.]

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175—Land not immediately required for the Purpose for which it was acquired—Interim User.

Where land has been acquired by an urban authority under the powers of the Public Health Act, 1875, and only part of the land so acquired is immediately required for the purposes for which it was acquired, while the remaining part may be ultimately required for the same purposes, it is not incumbent on the urban authority to sell the vacant land under s. 175 of the Act; but they may retain the same, and use it for some other lawful purpose, such as a recreation ground or the like, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with its use whenever required for the ultimate purpose for which it was acquired.

Attorney-General v. Corporation of Southampton, (1858) 1 Giff. 363, and *Bayley v. Great Western Ry. Co.*, (1884) 26 Ch. D. 434, discussed and distinguished.

THIS was an action claiming a declaration that the plot of land adjoining the sewage disposal works of the defendants on the south-eastern side, containing twelve acres or thereabouts, was land acquired by the defendants for the purpose of receiving and disposing of sewage, in pursuance of the powers contained in the Public Health Act, 1875, and that the same was not required for the purpose for which it was acquired; and for an order directing the defendants to sell the same in accordance with the 175th section of the Act; and for an injunction restraining the defendants from retaining the said plot of land unsold, and from using or appropriating any portion or portions of the same as a site for public promenade or recreation ground, or for ornamental water, or for a road, or for the building of houses, or for the purposes of the disposal of house refuse or otherwise, or for any purpose other than that of the reception and disposal of sewage.

In the year 1888 the defendants purchased, under the powers contained in the Public Health Act, 1875, for the purpose of

receiving and disposing of sewage, about twenty-five acres of land, and borrowed with the sanction of the Local Government Board what was required for providing the purchase-money for the same; and upon a portion of the land so purchased which was set apart and fenced off the defendants erected machinery, tanks, and filtration beds, for the purpose of the reception and disposal of the sewage. The defendants sold two-and-a-half acres of the land so purchased as not being required by them for sewerage purposes, in accordance with s. 175 of the Act. They also utilized a further portion of the land as a place of deposit for house refuse, and for that purpose caused trenches to be dug down to the level of the subsoil, and a mound to be made, thereby, as the relator alleged, rendering so much of the land unfit for the disposal of sewage. The relator also alleged that the defendants had sanctioned a scheme for constructing a public pleasure ground, promenade, and artificial lake on a further portion of the unused land, containing about four acres, and for constructing a footpath on a further portion of the land, thereby rendering such portions unsuitable for the purposes of sewage disposal; and he alleged that such portions of unsold land were, in the words of s. 175 of the Act, "not required for the purposes for which they were acquired," namely, the reception and disposal of sewage, and submitted that they ought to be ordered to be sold in accordance with the section.

The defendants alleged that their use of the land in the manner alleged was temporary only, and not such as to prevent the land from being used hereafter for the purpose for which it was acquired; and further, that, having regard to the rapid increase of their district in extent and population and to the necessity of having reserve land available for sewage disposal, the land was still needed for the purpose for which it had been acquired.

Neville, Q.C., and *F. R. Y. Radcliffe*, for the plaintiff. The urban authority have power only to do that which the Act gives them authority to do; and if they do anything on the land which they are not authorized to do, then the Court will interfere on the ground that they are abusing their parliamentary

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ROMER J. powers under which they acquired the land: *Attorney-General*
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v. Corporation of Southampton. (1) Until the land is devoted to the purpose for which it was acquired, it may be used for the purposes to which it was put at the time when it was acquired, but so that the character and user of the land may not be altered substantially in the interim: *Bayley v. Great Western Ry. Co.* (2) Our contention is that the application of the land for a totally different purpose to that to which it was applied at the time of acquisition, involving a large expenditure of public moneys, is not such an interim user as is within the powers of the defendants, and we submit that the land ought to be sold under s. 175 of the Act.

Macmorran, Q.C., and *E. Lewis Thomas*, for the defendants. We submit that although the whole of the land acquired is not at the present time required for sewage purposes, yet as it may at some time be required for such purposes, looking at the increase of the district in extent and population, it is within our powers to retain it for such purposes, and in the meantime to use it for legitimate purposes; and we further submit that the purposes we intend to put it to are lawful purposes with the exception of the trench and mound, which we undertake to fill up and remove.

Neville, Q.C., in reply.

ROMER J. The first question I have to consider is whether any part of the land in question in this action, which was acquired by the defendants for sewage purposes, is land which is not required for the purpose for which that land was acquired by them.

The conclusion I come to on the evidence is that, bearing in mind the recent rapid growth of this district and the probable increase of the population in it, all this land should be kept by the defendants for sewage purposes, and will ultimately be required; and I think the defendants would be acting very unwisely if they parted with any portion of it, or sold it as land not required for sewage purposes. It appears to me that the defendants ought to retain this land if they can for sewage

purposes, and to apply it for those purposes ultimately—in other words, that s. 175 does not apply to any portion of this land.

There is a further question. Have the defendants so dealt with any particular part of the land that it cannot now be used for sewage purposes? Now, the only parts that it could be suggested the defendants have so dealt with are those parts which have been referred to as the mound and the trench. I think what the defendants did with regard to that mound and trench was improper; but I also think that what they did has not made those parts of the land wholly unfit for sewage purposes: I think they could still be utilized, so that those parts of the land cannot now be said to be remaining in the hands of the defendants for non-sewage purposes. It follows that, in my opinion, no part of this land ought now to be sold, or should be now sold, or used or retained except for sewage purposes ultimately.

That does not dispose of this action by any means, because further questions have arisen. The relator says that the defendants have dealt with parts of the land improperly, and ought to be restrained from further improper dealings with the land. I will put aside the mound and the trench for a moment, and deal with the rest of the matters relied upon by the plaintiff. As to those matters, nothing in my opinion has been done of a permanent nature. The only things actually done which I need mention are the forming of a temporary path, and the placing of benches for the purpose of recreation on parts of the land not immediately required for sewage purposes. That user was, in my opinion, of a temporary nature only, and one not interfering with the land when required for sewage purposes. But it has been argued before me that the defendants are not entitled, even while retaining vacant land for sewage purposes, in the meantime to use it for the purposes I have mentioned. I think it right, therefore, to state shortly the views I take as to what the powers of the defendants are with reference to the interim user of the land not immediately required for sewage purposes. Now I agree that the defendants could not apply the land to or use it for any purpose inconsistent with the

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ROMER J. purpose for which it was acquired ; but in the present case those purposes did not require immediate use of every part of the land for sewage purposes. Some part only was required for immediate sewage works, and the remaining part has to be retained because needed hereafter for those works, and for the actual application of this remaining part for such purposes the defendants could retain it, and one of the purposes for which they acquired it might be said to be such interim retainer. Of course, while so retaining it they could not use or deal with it in such a way as to prevent or substantially interfere with its immediate use for sewage purposes whenever it was needed for those purposes. But subject to that exception while retaining it, I do not see how it was inconsistent, for the purposes for which they acquired it to use it, in any lawful manner in which in its then condition it could be used, provided it did not substantially interfere with the main purpose of drainage for which it was ultimately wanted. I know nothing which makes it unlawful for a council such as these defendants to permit vacant land in their possession, and not at the time required for the ultimate purpose for which they acquired it, temporarily to be used as a recreation ground, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with the council using it for such ultimate purposes whenever required.

The case of *Attorney-General v. Corporation of Southampton* (1), to which I have been referred, in nowise interferes with this view. What was that case? There land had to be held by certain trustees solely for the purpose of recreation, and it was held that those trustees could not use the land, even temporarily, as a fair for the sale of cattle, on the ground that that was not a purpose for recreation. Why? Because the land could not be used according to the trusts, even temporarily, except for the purposes of recreation. It was as much a breach of trust in that case to use it temporarily as it was to use it permanently for a cattle fair. Moreover, in my opinion nothing in the judgment of Cotton L.J. in *Bayley v. Great Western Ry. Co.* (2), to which my attention has also been

(1) 1 Giff. 363.

(2) 26 Ch. D. 434, 450.

called, in any way interferes with the views which I have previously expressed. It appears to me, therefore, that nothing unlawful has been done by putting temporary seats and making the temporary footpath.

Now I have to consider what has been threatened by the defendants, as alleged by the relator, in respect of this land apart from the mound and trench. Undoubtedly it was contemplated by the defendants that they would make what has been called a lake, or sometimes a dock, and widen the river there, and further improve the banks of the river by doing certain campshedding and making up the river frontage, and other analogous things. As to the campshedding and making up the river frontage, I will pass that by, because it is common ground that that would have been necessary for sewage purposes; but with regard to the other purposes, especially making the lake, making up the frontage of the land for recreation purposes, and building a bathing-place, there is considerable dispute. The defendants contend before me that they never intended to do anything with regard to these matters except substantially for sewage purposes. They say that making the lake, widening the river, making up the frontage, and laying it out, were really intended to be done for the purpose of enabling barges to carry coal and other materials to the sewage works, and in that sense were justifiable as works done by them for sewage purposes.

I go so far as to say that I think there is no doubt that portions of those works were intended to be done for sewage purposes in the way I have indicated; but when I look at all the facts of the case, the resolutions and the correspondence, I think that in substance it was contemplated by the defendants—not irrevocably, perhaps, I agree—that they would or might use portions of this land in question for such purposes, not being what I may call merely justifiable temporary purposes. But they assert at the bar that they have no intention of making any permanent works or of using these lands in any interim way which shall prevent them from properly using the land hereafter for sewage purposes, or which shall in the meantime interfere with that ultimate user, and I will take that

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ROMER J. statement. I will accept it, because I think that statement, made on behalf of the defendants at the bar, can be relied upon, and I will act upon it. Therefore I do not think, with regard to this part of the case, any injunction or special undertaking is required.

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All that I have now to deal with concerns the mound and the trench, and that I will deal with shortly. Those works clearly were not done for sewage purposes. They were really, in my opinion, to a great extent done to get rid of the dustbin refuse which the defendants as a council had to deal with. It is said that they were entitled to do those works because they were only temporary, and were not inconsistent with an interim innocent user of the land. But I come to the conclusion on the evidence that that user was most injurious to this land for sewage purposes; that though they did not fatally interfere with the land so as to prevent it being ultimately used in some way for sewage purposes, yet I do think it substantially interfered with its proper user and the full benefit being got from that land for sewage purposes, and that those works were works which were not justified as an interim innocent, lawful user of this land. I think they were works done which were inconsistent with the purposes for which the defendants acquired this land. With regard to that, as I understand it, the defendants are willing to give an undertaking that they will not repeat those works, or use this land for the purpose of further digging trenches and removing the gravel, and filling those trenches up with dustbin refuse; and with that undertaking I am content.

It only remains to deal with the question of costs. Looking at the whole circumstances of this case, I think that I am justified in doing what I intend to do, which is to order the defendants to pay the costs of the action.

Solicitors: *Powell & Rogers; G. C. Sherrard.*

G. M.

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[1896 R. 2095.]

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Nov. 2, 4, 13.

Trespass—Action against Public Officers in their Official Capacity—Agent of Executive Government—Liability of Servants of the Crown—Prerogative—Jurisdiction—Amendment.

Alleged authority of an executive Department is no justification for a trespass, but only those who commit or in fact authorize the trespass are liable.

The head of a Government Department is not liable for wrongful acts of officials in the Department, unless it can be shewn that the act complained of was substantially the act of the head of the Department himself.

The plaintiffs commenced an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass:—

Held, that though the plaintiffs could sue any of the defendants individually for trespasses committed or threatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie; leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land, was also refused, and the action was dismissed with costs.

ADJOURNED SUMMONS.

This action was commenced in December, 1896, against the Right Hon. George J. Goschen, M.P., and five other persons named in the writ and pleadings, and described as the Lords Commissioners of the Admiralty, and Major E. Raban, described as the Director-General of Naval Works, the object of which, as set out in the statement of claim, was for the purpose of establishing against the Lords Commissioners of the Admiralty and the Director-General of Naval Works that they were not entitled to enter upon, or take possession of, or acquire by way of compulsory purchase, certain land the property of the plaintiffs, in the neighbourhood of Dartmouth, in the county of Devon, forming part of an estate known as the

ROMER J. Mount Boone estate, for the purpose of establishing there a training college for naval cadets.

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The statement of claim set out certain correspondence that had passed between the officials at the Admiralty and the plaintiffs' advisers with a view to the acquisition of this land by the Admiralty by arrangement, in which reference was made to certain compulsory powers alleged to be possessed by the Admiralty, which might have to be put in force in the event of an arrangement for purchase not being accepted. This correspondence ended with a denial by the plaintiffs of the existence of these alleged compulsory powers, and a request that the Admiralty would desist from taking any further steps for the acquisition of the proposed site. Paragraph 12 alleged that the defendants had in November, 1896, entered upon some portion of the Mount Boone estate, and had placed thereon certain stakes with a view to the acquisition of the said site. Paragraph 17 was as follows: "The defendants have in fact by their servants and agents wrongfully entered upon certain parts of the plaintiffs' property known as the Mount Boone estate, they have surveyed and staked out portions thereof, and they threaten and intend to enter upon and take possession of such parts of the property of the plaintiffs as they allege are required by them for the purpose of establishing thereon a college for naval cadets. The defendants contend that they are entitled under certain statutes to acquire such portions of the land of the plaintiffs by way of compulsory purchase, and they threaten and intend forthwith to proceed to exercise that alleged right." The plaintiffs then claimed a declaration that the defendants had no right either by statute or otherwise to enter upon, or to survey or mark out, any portion of the plaintiffs' land, or to acquire the same by way of compulsory purchase; an injunction to restrain the defendants from entering upon, surveying, or marking out, taking possession of, or attempting to acquire by compulsory purchase, the said lands or any part thereof; damages, and costs.

By the defence it was submitted that the Court had no jurisdiction to entertain the action; that the defendants were merely the agents of the Crown, owing no duty to the plaintiffs,

and only responsible to Her Majesty and to Parliament, and that they were not liable to be sued in respect of acts done by them as part of the executive Government on behalf of Her Majesty; that whatever had been done with reference to the plaintiffs' lands was duly performed not by the defendants or any of them, but by the proper agents or officers of the Lords Commissioners of the Admiralty, acting by the direction of the executive Government under the Crown; and they submitted, as matter of law, that the action could not be maintained.

The defendants took out a summons under the Rules of the Supreme Court, Order xxv., rr. 2, 3, for trial of the preliminary point of law raised by the defence; and the plaintiffs took out a summons for leave to amend by adding a Mr. Shortridge, a civil engineer, and two marines from H.M.S. *Britannia*, who had staked out the land, as defendants, and by suing the defendants in their individual as well as in their official capacity.

These two summonses were adjourned into court, and now came on for trial together.

Sir R. E. Webster, A.-G., A. T. Lawrence, Q.C., and Ingle Joyce, for the defendants. The Court has no jurisdiction to maintain this action. The Lords Commissioners of the Admiralty, although entitled in certain circumstances to sue, are not liable to be sued in any of Her Majesty's Courts, except in the cases specially provided for by statute, which do not comprise or apply to the claim of the plaintiffs. The action asks for an injunction in the name of the Queen against the representatives of the Queen. The plaintiffs claim in respect of alleged torts for which neither the Crown, nor any agent of the Crown, as such, can be sued either by petition of right or otherwise; and neither the Lords Commissioners of the Admiralty nor the Director of Naval Works are or is, as such, liable to be restrained by any injunction of this or any other Court. An action will not lie against officials of the Crown for anything done by them in their public character or employment: *Gidley v. Lord Palmerston* (1); *Whitfield v. Lord Le Despencer* (2); neither

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(1) (1822) 3 Brod. & B. 275.

(2) (1778) 2 Cowp. 754.

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can compensation be recovered from the Crown for damage to the property of an individual: *Viscount Canterbury v. Attorney-General*. (1) No one would accept any office of trust under Government if he were to be made personally responsible for all acts done in his official capacity: *Sullivan v. Earl Spencer* (2); *Grant v. Secretary of State for India*. (3) Whether the action be founded on contract or in tort the same principles apply: *Palmer v. Hutchinson* (4); *Mersey Docks Trustees v. Gibbs* (5); *Nicholson v. Mounsey*. (6) The statement of claim in this case only alleges official acts as the acts complained of: a plaintiff cannot bring an action which is against public policy in order to argue a point of law, or to question the statutory power of the executive Government. There is no cause of action here which can be properly maintained against the defendants; and therefore this action ought to be dismissed.

Swinfen Eady, Q.C., and *S. Dickinson*, for the plaintiffs. In a case of tort there is no remedy by petition of right, and according to the argument on behalf of the Crown we have no remedy at all. We deny the defendants' right to acquire this land compulsorily: the Crown has no right to take any one's land against his will; it can only do what it proposes to do here by virtue of some parliamentary power; we deny the existence of any such power, and wish to try the question. How can we try it except by an action of this kind? The defendants as servants of the Crown cannot justify an act which the Crown had no power to do. The Crown cannot authorize a wrong: *Feather v. Reg.* (7); nor interfere with private rights unless authorized by the Legislature: *Walker v. Baird*. (8)

[ROMER J. referred to *Money v. Leach*. (9)]

An action for trespass can be maintained against Government officials: *Mostyn v. Fabrigas*. (10) The ministerial act of a public official can be restrained by injunction: *Ellis v. Earl Grey*. (11) The agent of the Crown is liable for tortious acts

(1) (1842) 1 Ph. 306.

(2) (1872) Ir. R. 6 C. L. 173.

(3) (1877) 2 C. P. D. 445.

(4) (1881) 6 App. Cas. 619.

(5) (1866) L. R. 1 H. L. 93.

(6) (1812) 15 East, 384.

(7) (1865) 6 B. & S. 257.

(8) [1892] A. C. 491.

(9) (1765) 3 Burr. 1742.

(10) (1774) 1 Cowp. 161.

(11) (1833) 6 Sim. 214.

committed by order of his superiors, though the Government may be morally bound to indemnify him: *Rogers v. Rajendro Dutt* (1); and this Court has jurisdiction to inquire into the nature of the acts complained of unless it is established that they are political acts of State: *Musgrave v. Pulido*. (2) If the defendants ordered or directed the trespass, they can be sued notwithstanding their official position: that is the object of this action. If there is any doubt on this point, we ask leave to amend by suing the defendants individually, and by adding as defendants the persons who actually trespassed on our land, and the official who ordered them to go.

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ROMER J. Mr. Attorney-General, I do not know that on the question of law I should be prepared to lay down any proposition to which you would not assent: the only question to my mind is, whether this is not a case in which an amendment ought to be allowed. I will state some general principles of law which I conceive govern this class of cases; and if you challenge any portion of what I am about to say, then I will hear you in reply. It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of State; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State.

I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shewn that the act complained of was substantially the act of the head himself: in which case he

(1) (1860) 13 Moo. P. C. 209.

(2) (1879) 5 App. Cas. 102.

ROMER J. would be liable as an individual, just as a stranger committing the same act would be.

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Sir R. E. Webster, A.-G., in reply. I quite accept that statement of the law, though there is one proposition I should prefer to put thus: If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be inquired into in this court; and in such a case it does not matter whether the defendant is the head of a department or not.

No amendment ought to be allowed, because the action as it stands, being one against a branch of the executive Government, is wholly misconceived, as was decided by Jessel M.R. in *Cowing v. Secretary of State for War* (1), which was an attempt to prevent the exercising of troops and artillery on Plumstead Common. No case is made out for allowing an amendment. It is a serious thing to allow actions of this kind, which are very common, to be cured by amendment. The plaintiffs will be in no way prejudiced by having to issue another writ. I must, on public grounds, press for the dismissal of the action, and the summons to amend.

Cur. adv. vult.

Nov. 13. ROMER J. I have already stated some general principles of law which, in my opinion, are applicable to cases like the present, and I need not repeat what I have said. But I will apply those principles, and point out shortly what kind of action the plaintiffs might have maintained, and what kind they were not entitled to bring, against the present defendants in respect of the matters referred to in the statement of claim. The plaintiffs are complaining of an alleged trespass said to have been committed on their land, and for which they claim damages, and they ask for an injunction to restrain further trespass on the land which they say is threatened. Now, in the first place, inasmuch as the plaintiffs could not sue the Crown for

(1) Parliamentary Paper of July, 1877, and *The Times*, January 23, 1877.

a past or threatened trespass, they could not, in respect of any trespass, sue the defendants in the capacity of agents for or as representing the Crown. Again, the plaintiffs could not sue the defendants merely on the footing that, as representing a branch of the executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government, or of the Admiralty as a Department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown, or the Government, or the Admiralty. And further, even if some of the defendants, acting on behalf of the Crown, or of the Government, or of the Admiralty, had committed or threatened a trespass, that would not justify the plaintiffs in suing the other defendants if they had taken no part in the transaction. On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government, or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs would, of necessity, be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship to have unlawfully ordered some of his sailors to take possession of a house and they obeyed his order, he could be sued for the trespass even though he himself remained on board his ship and did not personally go into the house. So, if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because, but in despite of the fact that they occupied official positions or acted as officials. In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs, in respect of

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ROMER J. the matters they are now complaining of, could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body. The question, then, before me narrows itself down to this : Is the present action one against the defendants as an official body, or is it an action against them as individuals ? And in dealing with this question I ought also to consider the summons to amend issued on behalf of the plaintiffs, and the affidavits filed in support of that summons. Now on the facts before me, and dealing fairly with the writ and statement of claim, the conclusion I come to is that the present action was intended to be, and is, a claim against the defendants in their official capacity and not as individuals. They are described and sued, except as regards the defendant Major Raban, as the Lords Commissioners of the Admiralty, and he is described and sued as the Director-General of Naval Works. Throughout the statement of claim no distinction is drawn between them, and no act, order, direction, or threat by any of them individually is alleged. Paragraph 1 of the statement of claim sets forth the general nature of the plaintiffs' case, and shews that what the plaintiffs wish to do is to have some general question decided as between them and the defendants as representing the Admiralty. The correspondence referred to in the statement of claim is with the Admiralty, or with certain officials in an official capacity only. Then, so far as regards trespasses alleged to have been actually committed or threatened, the only material paragraphs are those numbered 12 and 17. Paragraph 12 alleges that the defendants had entered upon some portion of the plaintiffs' estate and placed stakes there. Now, it was admitted before me on behalf of the plaintiffs that it was not suggested, or intended to be suggested, that the defendants themselves had done this. The paragraph shews that in this action, when an act of the defendants is referred to, what is meant and intended to be alleged is the act of the defendants treated as an official body—that is to say, as a body representing the Crown or Government, or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown, or of the Government,

or of the Admiralty. Then, all that is contained in paragraph 17 is a general allegation that the defendants by their servants and agents have trespassed, and threatened to trespass again. That refers again, as I understand it, to acts alleged against them as an official body on the footing above mentioned. But any possible doubt as to what kind of action this is appears to me to be set at rest by the plaintiffs' summons to amend their writ and subsequent proceedings, and the affidavits filed in support of that summons. The affidavits state that the alleged trespass was committed by two marines acting under the directions of Mr. Shortridge, a civil engineer employed in Her Majesty's Dockyard at Devonport. Those affidavits do not allege any personal participation in the alleged trespass, or any threat of future trespass by, or by the order or direction of, any of the defendants. Then the summons asks for leave to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the two marines and Mr. Shortridge as co-defendants. In other words, the summons proceeds on the footing that the present action is one against the present defendants in their official capacity only; and I think the plaintiffs' own view as to their action is the correct one. It follows that, in my opinion, the present action as it stands is misconceived and will not lie; and the only further question I have to consider is whether I ought to give the plaintiffs leave to amend as asked by them. On consideration I think I ought not; for what the plaintiffs are seeking to do is to change one action into another of a substantially different character. Apart from the fact that the present action cannot be sustained, while the other might lie, an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals, as will be seen when consideration is paid to questions of discovery, and to the form of any interlocutory injunction or final judgment that could be obtained by the plaintiffs, and as to how and against whom such injunction or judgment could be enforced. Moreover, as pointed out above, the affidavits in support of the summons to amend do not venture to allege any claim against any of the defendants individually. For

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ROMER J. these reasons I think I ought not to allow leave to amend as asked. If the plaintiffs have in fact any claim against any of the present defendants individually, that claim will be more properly and conveniently enforced in a separate action. At the same time I will take care to provide by my order that the dismissal of the present action shall not prejudice any just claim the plaintiffs may have. I therefore order the present action to be dismissed with costs without prejudice to any claim the plaintiffs may have against the two marines or Mr. Shortridge, or against any of the defendants individually, in respect of any trespass committed or threatened. The costs of the summons and of any pending interlocutory application will be costs in the action.

Solicitors: *Treasury Solicitor; Petch & Smurthwaite.*

W. C. D.

Distinguished. *Re* DOWIE'S WILL
TRUSTS. [1949] 1 All E.R. 968.

Distinguished. *Re*
DOWIE'S WILL TRUSTS.
[1949] 1 Ch. 547

ROMER J.

LOVETT v. LOVETT.

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[1896 L. 1615.]

Nov. 24, 25.

Voluntary Settlement — Construction — Reversionary Interest — Power of Appointment — Recital — Estoppel.

The plaintiff, born in 1875, was an only child. Her father died in 1886. She married in January, 1892, being then entitled under the settlement made on the marriage of her father and mother, dated April 15, 1874, subject to the exercise by her mother of the power of appointment contained in that settlement in favour of the issue of the marriage and to her mother's life interest to the property comprised in the settlement.

By a voluntary settlement dated July 27, 1892, after reciting that the property comprised in the settlement of April 15, 1874, was vested in trustees upon trust to pay the income to the plaintiff's mother for life, and upon her death upon trust for the plaintiff, her heirs, executors, administrators, and assigns, the plaintiff conveyed all her reversionary property under the settlement of April 15, 1874, to trustees upon trust for conversion and to pay the income to herself for life, then to her husband for life, and, on the death of the survivor, on the usual trusts for the benefit of their issue, with a trust in default of issue in favour of the plaintiff. The settlement contained no covenant to settle after-acquired property, and no power of revocation.

In August, 1897, the plaintiff's mother, in exercise of the power contained in the settlement of April 15, 1874, irrevocably appointed that the

trustees of that settlement should stand possessed of the property therein comprised in trust for the plaintiff, her executors, administrators, and assigns absolutely. There was no issue of the marriage between the plaintiff and her husband.

Held, that the deed of July 27, 1892, only passed the interest which the plaintiff had under the deed of April 15, 1874, and did not comprise the interest taken by her under the appointment.

The recital, though inaccurate, was true as far as it went, and worked no estoppel either legal or equitable.

Equitable estoppel is not applied in favour of a volunteer.

Citizens' Bank of Louisiana v. First National Bank of New Orleans, (1873) L. R. 6 H. L. 352, discussed.

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By a marriage settlement dated April 15, 1874, made between M. L. Frederick of the first part, Maria Louisa Frederick of the second part, and trustees of the third and fourth parts, certain hereditaments and premises situate at Cuppagh, in the county of Dublin, were conveyed to the trustees upon trust to pay the rents, issues, and profits to the said Maria Louisa Frederick for life as therein mentioned; and it was thereby agreed that the trustees should invest the residue which, after certain payments therein mentioned, should remain of the purchase-moneys to arise from the sale of the one-fourth share of certain other hereditaments therein mentioned, situate in Lambeth and Camberwell, and pay the interest and annual produce thereof to the said M. L. Frederick for life, and after his decease to the said Maria Louisa Frederick for life, and after the decease of the survivor should stand possessed of the said land and premises thereby granted, and of the residuary moneys, stocks, funds and securities, dividends, and income, in trust for all or such one or more exclusively of the other or others of the children or such remoter issue of the marriage as therein mentioned, in such manner as the said M. L. Frederick and Maria Louisa Frederick should jointly appoint; and in default, as the survivor should by deed or deeds, with or without power of revocation and new appointment, or by his or her will appoint; and in default of such appointment, in trust for all the children of the marriage as therein mentioned.

The plaintiff was born on February 27, 1875, and was the only child of the marriage of M. L. Frederick and his wife Maria Louisa Frederick.

ROMER J. M. L. Frederick died in October, 1886 ; and in January, 1892,
1897 the plaintiff married the defendant R. J. A. Lovett.

LOVETT Under the will of the plaintiff's father, she became entitled
v. to in reversion expectant on the death of her mother to one un-
LOVETT divided twelfth part of the freehold hereditaments at Lambeth
— and Camberwell comprised in the indenture of April 15, 1874.

By a voluntary settlement dated July 27, 1892, expressed to be made in pursuance of an order of the Lord Chancellor of Ireland, and between the defendant R. J. A. Lovett of the first part, the plaintiff of the second part, Maria Louisa Frederick of the third part, and the defendants E. N. Lovett and G. W. Browne of the fourth part, after reciting that the lands at Cuppagh were vested in the surviving trustee of the indenture of April 15, 1874, upon trust to pay the net rents, issues, and income thereof to the said Maria Louisa Frederick for life, and after her death to stand seised and possessed of the said lands in trust for the plaintiff, her heirs and assigns, and that the one undivided fourth part of the hereditaments at Lambeth and Camberwell, together with the residuary moneys in the indenture of April 15, 1874, mentioned, were then vested in the surviving trustee of that indenture upon trust to pay the dividends, income, and annual produce thereof to Maria Louisa Frederick for life, and after her decease in trust for the plaintiff, her heirs, executors, administrators, and assigns, the plaintiff granted and conveyed to the defendants E. N. Lovett and G. W. Browne all her reversionary property under the settlement of April 15, 1874, and under the will of her late father upon trust for conversion and investment, and for the payment of the income of the trust property to the plaintiff during her life without power of anticipation, and after her death to the defendant R. J. A. Lovett during his life, and after the death of the survivor upon usual trusts for their issue, with a trust in default of issue in favour of the plaintiff. The settlement contained no covenant to settle after-acquired property, and no power of revocation.

There was no issue of the marriage between the plaintiff and her husband, and no living person interested under the settlement other than the plaintiff and her husband.

By a deed-poll dated August 5, 1897, Maria Louisa Frederick, in exercise of the power in that behalf contained in the indenture of April 15, 1874, absolutely and irrevocably appointed that the trustee or trustees for the time being of that indenture, from and immediately after her decease and in the meantime subject to her life interest, should stand seised and possessed of the whole of the land and hereditaments, trust funds, and premises comprised in or subject to the trusts of the same indenture, in trust for the plaintiff, her executors, administrators and assigns absolutely for her sole and separate use.

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The plaintiff by this action claimed a declaration that, subject to the interest therein of the said Maria Louisa Frederick, the plaintiff was entitled to the property comprised in the indenture of April 15, 1874, notwithstanding the settlement of July 27, 1892, the question being whether the interest taken by the plaintiff under the exercise of the power of appointment was comprised in the settlement made by her.

Neville, Q.C., and *Clare*, for the plaintiff. The plaintiff was, at the date of the settlement of July 27, 1892, entitled to the property comprised in the deed of April 15, 1874, in reversion in default of appointment. The settlement executed by her was not of all property which might come to her in any event, but only of that which was then vested in or belonging to her; the deed does not purport to settle or deal with after-acquired property, or to pass anything but estates or interests then existing. *Sweetapple v. Horlock* (1) is directly in point, and we submit that the interest taken by the plaintiff under the appointment is not comprised in the settlement.

As to the question of estoppel, we say that there is none in this case. The conveyance was an innocent one. The recital in the deed that the plaintiff was entitled to the trust premises subject to her mother's life interest will not create an estoppel: *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (2); *Heath v. Crealock* (3);

(1) (1879) 11 Ch. D. 745.

(2) (1878) 10 Ch. D. 15.

(3) (1874) L. R. 10 Ch. 22.

ROMER J. *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1); *Mills v. Fox*. (2) She was entitled indefeasibly, subject to the power of appointment.

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Levett, Q.C., and *S. Dickinson*, for the defendants *E. N. Lovett* and *G. W. Browne*, the trustees of the deed of July 27, 1892. This property is subject to the trusts of the settlement. The appointment did not divest the interest under the settlement: *Re Frowd's Trusts*. (3)

The plaintiff is estopped by the recital in the deed that, subject to the life interest of her mother, she was entitled to the property. It is a recital of a particular fact, and not a general recital; there is no want of certainty in the allegation, and so there is clearly an estoppel.

Ashton Cross, for the defendant *R. J. A. Lovett*.

Neville, Q.C., in reply.

ROMER J. The result at which I have arrived no doubt may appear somewhat startling; but after consideration, contrary to my first impression, I have come to the conclusion that the plaintiff is entitled to the relief she claims.

The cases that have been cited before me I think establish—and in my opinion it is now the law—that if a person assigns his interest in property, whether real or personal, to which at the time he is entitled in default of appointment by another person, and afterwards he obtains that property under an exercise of the overriding power of appointment, he can claim the property notwithstanding the assignment, and even though the power was limited to a class of which he was one, and though that power and his interest in default of appointment were both created by the same settlement or instrument, the reason being that the interest he obtained by the exercise of the power was a distinct one from that he possessed at the date of the assignment.

Now, I apply that principle to the case before me. I bear in mind that the deed was a settlement by an infant of her then property. *Primâ facie* it would only pass her then interest

(1) L. R. 6 H. L. 352, 360.

(2) (1887) 37 Ch. D. 153.

(3) (1864) 10 L. T. 367; 4 N. R. 54.

under the settlement referred to in the deed, and not an interest she had not then and only obtained afterwards, namely, the interest under the exercise of the power of appointment by the mother. Ought I in the first place to construe the deed dealing with it as a question of construction as one intended to pass this possible future interest—this expectancy? In the absence of some overwhelming reason to the contrary, I think I ought not to do so, bearing in mind, as I have already said, that the lady was an infant at the time, and seeing that the deed does not purport to pass anything but estates or interests then existing, and does not purport to settle or deal with after-acquired property. In the deed of settlement there is no reference whatever to the power of appointment. Had it been intended to release that power or to prevent its being exercised, that could easily have been effected. The power could have been released or, if so intended, the mother might have exercised it on the settlement or immediately before it.

There is no covenant in this deed referring to a settlement, and nothing that I can find which binds the mother or the infant in any way that the power to appoint shall not be exercised.

The main contention of the trustees, who have very properly brought before me all the considerations which ought to bear in this case in favour of those claiming under the settlement, has been the recital in the deed of the lady's title. I look at that recital, and except that it does not go far enough, so far as it does go it appears to be accurate. The infant was entitled, as the matter then stood, subject to the life interest of her mother, to the property she purports to assign. What the recital does not say, and what no doubt it ought to have said, is this—that her estate and interest was liable to be defeated by an exercise of a power of appointment.

It appears to me, looking at the considerations I have already pointed out—the form of this deed and the position of the infant—that I ought to give a reasonable construction to this recital and make it accord with the facts, as in fact it does if you treat it as an incomplete recital, or as a recital not stating all the facts, and I think it ought to be treated as a statement

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ROMER J. of what her then interest was and as omitting reference to the fact that that interest was defeasible.

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Dealing therefore with this matter as a question of construction, it appears to me, as I have already said, that I ought not to construe this deed as intended to pass anything more than the lady's then interest in the property—the property she was then entitled to ; and as I have already pointed out, that would not cover a property, an interest, or an estate which she had not then and did not acquire until after the settlement.

That appears to me really to dispose of this case, for I am satisfied that here there is no estoppel. Certainly, in my opinion, there cannot be any equitable estoppel. The principle of equitable estoppel has been, if I may say so, clearly stated by Lord Selborne in the case of *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1), and it shews that equitable estoppel is not applied in favour of a volunteer. Nor in this case can I see any estoppel at law. I can find no estoppel by the terms of the conveying part of the deed, the conveyance being what is called an innocent one ; and I can find no estoppel in the recital for the reasons I have already pointed out in dealing with the question of construction. That recital can have a meaning given to it which is in strict accordance with the facts, and need not be construed as a statement of what was not true at the time.

It follows, in my opinion, as I have already said, that the plaintiff is entitled to the relief she has claimed, that is to say, the relief she has claimed at the bar, which is limited to the property which passed under the marriage settlement. There will be a declaration that the interest taken by the plaintiff under the exercise of the power of appointment is not comprised in the settlement.

Solicitors : *Cridland & Nell ; Janson, Cobb, Pearson & Co.*

(1) L. R. 6 H. L. 352, 360.

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*In re* SMYTH.  
LEACH *v.* LEACH.

[1889 S. 1517.]

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Nov. 13, 27.

*Revenue—Probate Duty—Property in Jamaica—English Will—Trust for  
Sale—Local Situation of Asset.*

A testator, who at the date of his will and death was living and domiciled in England, made an English will whereby in effect he devised and bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life and their issue, and upon the deaths of those persons and failure of issue upon trust to sell the plantation and divide the proceeds amongst several persons therein named. The trustees were at the above dates all domiciled in the United Kingdom; and one of them after the testator's death proved the will in England and acted as trustee, and held as trustee in this country the plantation upon the trusts of the will.

The trust for sale ultimately took effect, and the proceeds of sale of the plantation became divisible amongst the several persons named in that behalf in the will, or their legal personal representatives.

One of those persons, who was at the time of his death living and domiciled in England, died while the persons entitled for life were in existence, and the question was whether probate duty was or was not payable here on his death in respect of his interest under the will:—

*Held*, that the interest of the legatee under the will was an English equitable chose in action, recoverable in England, and an English and not a foreign asset, and as such was subject to probate duty here.

*Lord Sudeley v. Attorney-General*, [1897] A. C. 11, followed.

PETITION of Henry Leach and others for the distribution amongst the persons beneficially interested of certain funds standing to the credit of the action; “the share of Edward Leach, duty paid,” and “the share of John F. Leach, duty paid”; and, for the purpose of enabling such distribution to be made, to obtain the direction of the Court as to whether certain duties claimed by the Commissioners of Inland Revenue in respect of such funds were payable.

Francis George Smyth, by his will dated May 31, 1837, describing himself as of Clifton, in the county of Gloucester, gave all his estates, lands and grounds in the Island of Jamaica, with the messuages, premises, apprenticed labourers, cattle, stock,

ROMER J. and appurtenances thereto belonging, and also the compensation money received in respect of the slaves upon his plantations, and all his real estate whatsoever and wheresoever, unto and to the use of William Wilson Currey, described as then residing in the kingdom of Ireland, and the testator's nephews Edward Leach and John Frederick Leach, their heirs, executors, administrators, and assigns, upon trust for the benefit of his wife Catherine Smyth, his daughter Harriet Catherine Capel, and her children, and his nieces Zena Currey and Elizabeth Costobardie, and their children as therein mentioned; and upon the failure of such trusts, which happened, then upon trust that his said trustees should sell and absolutely dispose of the entirety of his said plantations, apprenticed labourers, money, cattle, stock, and hereditaments, and should stand possessed of the moneys to arise from such sale upon trust to pay and divide the same among his nine nephews and nieces therein named, of whom the said Edward Leach and John Frederick Leach were two; and the testator directed that his said trustees should stand possessed of all such live and dead stock, implements, utensils, and other personal chattels which should for the time being be in or upon his said estates, and the rents and profits thereof, and also of the said compensation money, and the interest and dividends thereof, upon trust for the person or persons who should under the trusts thereinbefore declared be for the time being beneficially entitled to the rents and profits of the said estates; and the testator gave to his trustees a power of sale over the trust premises, with a direction to invest the moneys to arise from such sale in the public funds, or upon real security in Great Britain; and appointed his wife and his trustees executors of his will.

The testator died in June, 1839, domiciled in England, and his will was proved in London by the said William Wilson Currey, who duly paid his debts and general and testamentary expenses. All the executors and trustees of the testator's will were at the time of the will and of the testator's death domiciled in the United Kingdom.

The testator was not at the time of his death entitled to any real estate outside the Island of Jamaica, and such personal

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estate as he had outside that island (except a sum of 725*l.* 13*s.* 3*d.* Consols, representing the compensation money received in respect of slaves mentioned in his will, which remained after his death in the same state of investment) was paid and exhausted in payment of his debts and funeral and testamentary expenses; but he was entitled to divers plantations and estates in the island, together with the stock, chattels, and effects thereon, all of which estates, chattels, and effects remained in Jamaica until realized as after mentioned.

John Frederick Leach died in March, 1843; William Wilson Currey died in March, 1844; Catherine Smyth, the testator's widow, died in November, 1854; and Edward Leach, the surviving trustee of the testator's will, died intestate in November, 1855, domiciled in Wales, Henry Leach, the first-named petitioner, being his legal personal representative and heir-at-law.

Harriet Catherine Capel, the testator's daughter, died in July, 1866, without having had issue. The said Zena Currey survived the said Elizabeth Costobardie (who died without ever having had issue), and died in February, 1888, without ever having had issue; and upon her death the ultimate trusts by the testator's will declared in favour of his nine nephews and nieces (all of whom predeceased Zena Currey) took effect.

This action was commenced to have the trusts of the testator's will, so far as they related to the Jamaica estates and the compensation money for slaves, carried into execution; and, in pursuance of the judgment dated July 15, 1889, the estates and effects of the testator in Jamaica were from time to time sold, and divers sums were from time to time remitted to England and paid into court and invested in Consols; and under the order on further consideration the funds so paid into court were divided into nine equal shares of 3435*l.* 6*s.* 1*d.* and 26*l.* 5*s.* 9*d.* cash each. Of these nine shares, three were paid out to the persons entitled, and the remaining six were carried over to separate accounts and accumulated, the share of the said Edward Leach being carried to an account entitled "The share of Edward Leach, deceased, duty paid," and the share of the said John Frederick Leach being carried over to an account entitled "The share of John Frederick Leach, duty paid." Subsequently,

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ROMER J. in pursuance of a further order, probate duty was paid out of the funds in court representing such respective shares upon the whole of such shares respectively.

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Legacy duty under the testator's will was duly paid on so much of the funds in court as did not represent proceeds of sale of real estate in Jamaica: but the Commissioners of Inland Revenue contended that, in addition to such legacy duty, probate duty and legacy duty (except so far as the legacy duty at 1 per cent. was covered by the probate duty) became payable on the death of every person through whom a beneficial interest in the funds in court had devolved since the death of the original testator, while the petitioners felt certain that the persons found to be legally and beneficially entitled to the funds in court would dispute that contention as to probate and legacy duty on the death of any person who died before the proceeds of the property in Jamaica were remitted to England, and further contended that too much probate duty had been already paid in respect of the shares of Edward Leach and John Frederick Leach. It was then arranged that this petition should be presented for a declaration whether any and what duty or duties were payable in respect of the funds in court in addition to the legacy duty which had been already paid in respect thereof.

*Neville, Q.C.*, and *R. J. Parker*, for the petitioners. Liability to probate duty is limited to that part of the property to be administered which is situate within the jurisdiction at the time of the testator's death: *Attorney-General v. Hope*. (1) In this case the whole of the assets, with the exception of the Consols, were foreign assets, and they continued to be foreign assets till the funds came over here—that is, till after the death of Zena Currey in 1888. Being foreign assets, probate duty does not attach: *Laidlay v. Lord Advocate*. (2) The question to be determined is the situation of the asset at the time of the death of the person whose estate it is sought to charge.

*Vaughan Hawkins*, for the Crown. This case is entirely governed by *Lord Sudeley v. Attorney-General*. (3) The will is

(1) (1834) 2 Cl. & F. 84.

(2) (1890) 15 App. Cas. 468.

(3) [1897] A. C. 11.



the will of a domiciled Englishman. The executors and trustees were all domiciled here both at the date of the will and at the testator's death, and the will has been proved and the estate is being administered here, and the claim against the estate is therefore an English asset. Probate duty and legacy duty became payable on the death of every person through whom a beneficial interest in the funds in court devolved since the death of the testator. [He also referred to *In re Cigala's Settlement Trusts* (1) and *Attorney-General v. Marquis of Ailesbury*. (2)]

*Neville, Q.C.*, in reply.

*Cur. adv. vult.*

Nov. 27. ROMER J. The question as to probate duty in this case may be shortly stated as follows: [His Lordship stated the facts as they are set out in the head-note.] The question is whether probate duty is or is not payable here on the death of that person (I will call him the legatee) in respect of his interest under the will.

Now, that interest was undoubtedly of the nature of personality, and the question, therefore, narrows itself down to this: Is the interest to be considered an English asset, or to be treated as foreign because the plantation was situate in Jamaica? In my opinion, it is to be regarded as an English asset. The case is governed by the principles which led to the decision in the case of *Attorney-General v. Lord Sudeley* (3), and the judgment of Lopes L.J. applies almost word for word to the case before me; and that judgment was approved of and adopted by the House of Lords when the case was heard upon appeal. (4)

At the time of his death the only right the legatee had, in the case before me, was to have the trusts of the will duly performed, and in particular to have the trust for sale carried into effect at the due time, and the net proceeds of the sale, after paying costs and the expenses of the trustee, divided by the trustee between the legatee and the other persons entitled. As matters stood, he was not entitled to the plantation itself, or to

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(1) (1878) 7 Ch. D. 351.

(2) (1887) 12 App. Cas. 672.

(3) [1896] 1 Q. B. 354, 362.

(4) [1897] A. C. 11.

ROMER J. any specific part or share of it. The trustee was not a trustee of the plantation, or of any specific part or share of it, for him. All he was entitled to was his proportion of the net proceeds of the plantation after realization. He had no claim against the plantation to recover it or any portion of it: that was a claim enforceable only by the trustee. The right of the legatee as against the trustee was only to have the trusts of the will administered. Administered where? The testator was domiciled in England, his will was proved in England, his trustee was in England, and the money recoverable would in the ordinary and proper course be brought to England. The trustee could only be properly and in the ordinary course sued in the English Court by the legatee, who was in England. The asset was an English equitable chose in action, recoverable in England, and an English and not a foreign asset, and as such subject to probate duty here.

It was suggested as against the Crown that possibly under some circumstances an action might have been brought by the legatee to enforce his rights in Jamaica. I am bound to say that at present I do not see what action could have been properly brought there. But even admitting that under some conceivable circumstances or change of circumstances some action might have been brought there, the question is not in what place under extraordinary circumstances an action might be brought, but what place under existing circumstances was the natural and proper one in which the legatee should enforce his rights—in other words, what was the proper forum for deciding upon the legatee's claim; and the answer to this clearly is that the forum was English. And in reference to this view, I may refer to the case of *In re Cigala's Settlement Trusts* (1), and the observations of Jessel M.R. in that case. I therefore declare that probate duty was payable on the death of the legatee in respect of his interest under the will.

Solicitors: *Norris, Allens & Chapman*; Solicitor to Inland Revenue.

(1) 7 Ch. D. 351.

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*In re* WILCOCK.  
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[1897 W. 1529.]

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Nov. 12, 20;  
Dec. 4.

*Will—Absolute Gift of Personalty—Codicil—Gift of same Personalty for Life with Remainder to Children—“Instead of such bequests in the manner expressed in” the Will—Absolute Gift in the Will not revoked by the Codicil.*

A testator by his will bequeathed his personal estate to his two daughters A. and B. equally.

By a codicil he directed that “instead of such bequests in the manner expressed in my said will to such daughters absolutely,” his executors should stand possessed of his personal estate upon trust for sale and conversion, and to pay the income in moieties to his two daughters for life, and on the death of either of them to pay the moiety of the trust moneys to their children as they should by deed or will appoint. The codicil contained no gift over in the event of a daughter dying without issue.

B. died without ever having had any issue, having by her will devised and bequeathed all her real and personal estate to her executors, upon the trusts therein mentioned:—

*Held*, that there was no intestacy as to the moiety of the personal estate given to B., there being no revocation under the codicil of the absolute gift given to her by the will.

*Doe v. Marchant*, (1843) 6 Man. & G. 813, followed.

DAVID WILCOCK by his will, dated October 10, 1840, gave and devised certain real estate to his daughters Sarah and Harriett, upon trust as to one moiety for Sarah for life, and as to the other moiety for Harriett for life, and from and after the decease of either of them the testator gave and devised one of such moieties to the children of such deceased daughter as tenants in common; and on the decease of the survivor of them he gave and devised the other moiety to the children of such deceased surviving daughter as tenants in common, with a proviso that in case of either or both of his daughters dying without leaving issue, he gave the moiety intended for such issue to his (the testator's) surviving children as tenants in common, and if only one survivor, then to such survivor. And the testator gave and bequeathed all his personal estate and effects unto and equally between his said daughters, share and share alike, and directed

ROMER J. that each of his daughters should have and be paid 1000*l.* on their respective days of marriage in part of their respective shares of his personal estate; and he appointed his son William Wilcock and his two daughters executors of his will.

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By a codicil, dated May 27, 1847, the testator directed that the provisions mentioned in his will for payment of 1000*l.* to each of his daughters should be null and void; and as to his personal estate and effects, which he had by his will bequeathed to his two daughters equally, he directed that, "instead of such bequests in the manner expressed in my said will to such daughters absolutely," his executors should stand possessed thereof upon trust for sale and conversion, and to pay one-half of the annual income to his daughter Sarah for life for her separate use, and the other half to his daughter Harriett for her separate use; and on the decease of either of his daughters, as to one half part of such trust moneys or personalty, to pay the same to such one or more of the children of such first deceased daughter as she should by deed or will appoint, and in default to such children equally; and as to the other half part of such trust moneys and personalty, upon like trusts for the benefit of the surviving daughter and her children, as therein mentioned; and he empowered his daughters by deed or will to give the whole or any part of the income to her husband for his own benefit during his life. The codicil contained no gift over in the event of a daughter dying without issue.

The testator died in 1847, leaving the said William Wilcock, Sarah Wilcock, and Harriett Wilcock his only children and sole next of kin.

Sarah Wilcock married James Dewhirst, and died intestate in 1858, having survived her husband, leaving several children, of whom the defendants Mary Dewhirst and Hannah Dewhirst were two.

William Wilcock died in February, 1877, having by his will appointed the defendant Hill his executor, and bequeathed his residuary personal estate to his two sons, of whom the defendant Vernon Wilcock was one, equally.

Harriett Wilcock married David Hemsworth, and died a widow in October, 1896, without ever having had any issue,

having made her will, dated March 15, 1894, whereof she appointed the plaintiff and the defendant Mary Dewhirst executors, and whereby she devised and bequeathed all her real and personal estate to her executors upon trust for sale and conversion, and upon, further trusts under which the defendant Mary Dewhirst was absolutely entitled thereto.

The questions were whether, upon the death of Harriett Hemsworth without ever having had any child or children, the moiety of the testator's real estate to which she was entitled for life passed, as on an intestacy, to the testator's heir-at-law; and whether the moiety of the personal estate passed under the will of Harriett Hemsworth, or as on an intestacy.

On the question as to the moiety of the real estate in which Harriett Hemsworth took a life interest, the Court declared that there was an intestacy, but desired that the question as to whether there was an intestacy as to the moiety of the personal estate in which she took a life interest should be argued.

Harry Greenwood, for the plaintiff, one of the trustees of the testator's will.

Farwell, Q.C., and *Pattullo*, for the defendant Mary Dewhirst, contended that there was no express revocation of the absolute gift in the will, and that the gift stood except so far as was necessary to give effect to the codicil, and relied on *Doe v. Marchant*. (1)

Neville, Q.C., and *E. F. Spence*, for the defendant Hannah Dewhirst.

Levett, Q.C., and *Mark Romer*, for the defendants Hill and Vernon Wilcock, contended that there was a complete revocation of the gift in the will, the words "instead of" in the codicil clearly pointing to such complete revocation; and that there was an intestacy as to the moiety of the personal estate bequeathed by the will to Harriett.

[The following cases were cited or referred to: *Bell v. Jackson* (2); *Lassence v. Tierney* (3); *In re Richards* (4); *Tupper*

(1) 6 Man. & G. 813.

(3) (1849) 1 Mac. & G. 551.

(2) (1851) 1 Sim. (N.S.) 547.

(4) (1883) 50 L. T. 22.

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ROMER J.

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ROMER J. *v. Tupper* (1) ; *Norman v. Kynaston* (2) ; *Kellett v. Kellett* (3) ;
 1897 *Gompertz v. Gompertz* (4) ; *Davidson v. Kimpton*. (5)]

WILCOCK,
In re.

Cur. adv. vult.

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Dec. 4. ROMER J. I have had, and still have, considerable doubt as to what my decision ought to be in this case. But on further consideration, I have come to the conclusion, contrary to my first impression, that there is no intestacy as to Mrs. Hemsworth's share of the residuary personal estate.

Undoubtedly by the will that share is given to her absolutely. And the question is whether that gift is revoked by the codicil beyond what is necessary to give effect to the special provisions of that codicil. The principles applicable to the question are clear. The first is that referred to by Lord Cairns in *Kellett v. Kellett* (6), where he says: "The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct." Another principle is that pointed out by Lord Cottenham, in *Lassence v. Tierney* (7), that "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects the absolute gift prevails." On the other hand, as pointed out in *Gompertz v. Gompertz* (4), and also in *Lassence v. Tierney* (8), and again by Pearson J. in *In re Richards* (9), it is clear that if there is an absolute gift by will, and then a clause (whether in a subsequent part of the will or by codicil) not merely modifying the enjoyment by the legatee but diminishing the estate originally given to him, then the absolute gift has in effect been cut down; and the Court can only give effect to it so diminished. Now, applying these principles to the case before me, what effect ought I to give to the codicil? The conclusion I come to is that the testator has not thereby entirely revoked the gift by the will, but has only modified it to the extent shewn by that codicil. It is notice-

(1) (1855) 1 K. & J. 665.

(2) (1861) 3 D. F. & J. 29.

(3) (1868) L. R. 3 H. L. 160.

(4) (1846) 2 Ph. 107.

(5) (1881) 18 Ch. D. 213.

(6) L. R. 3 H. L. 167.

(7) 1 Mac. & G. 561.

(8) *Ibid.* 551.

(9) 50 L. T. 22.

able that by the codicil the payment of 1000*l.* provided for by the will is clearly revoked. But when the testator comes to deal with the residuary personal estate he only says that, instead of the bequest in the manner expressed in the will to his daughters absolutely, he directs his executors to stand possessed of the residuary personal estate upon trusts which are for the benefit of the daughters, their children and appointees. This is certainly not clearly a total revocation; and I gather that the real object of the codicil was only to modify the gifts to the daughters in the will to the extent and in manner pointed out by that codicil, but not beyond.

I quite feel the force of the word “instead” used in the codicil; but the other words used, “in the manner expressed in my said will to such daughters absolutely,” seem to me to point, not to a total substitution of the new gift for the old, but to a modification of the old gift. And I think to carry out the will and codicil taken together the same meaning should be given to the word “instead” as was given in *Doe v. Marchant* (1), where Tindal C.J. says: “The argument on the part of the plaintiff has been, that, inasmuch as the devise in the codicil is expressly given to Betty Jones ‘instead of’ the devise and bequest contained in the will, it must be considered as an express revocation of the former devise, and the substitution of that contained in the codicil. But we think the force of that word will be satisfied without giving it so large an operation; and that it may well be interpreted to mean ‘instead of so much only of’ the devise in the will as is incompatible with the disposition contained in the codicil. And this appears to us the sounder construction, as it is the manifest intention of the testatrix, both in the will and codicil, to make Betty Jones the principal object of her bounty.”

On these grounds there must be a declaration that there is no intestacy as to the moiety of the personal estate given to Mrs. Hemsworth.

Solicitors: *Windybank, Samuell & Behrend, for Simpsons & Denham, Leeds; R. H. Behrend; Ince, Colt & Ince, for Carter, Atkinson & Bentley, Pontefract.*

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In re ANGLO-AMERICAN EXPLORATION AND
DEVELOPMENT COMPANY.

1897

[00157 of 1897.]

Oct. 27;
Nov. 3.
—

*Company—Winding-up—Defunct Company—Advertisement of Petition—
Companies Act, 1880 (43 & 44 Vict. c. 19), s. 7—Companies Winding-up
Rules, 1890, r. XXXV.*

Where the Registrar of Joint Stock Companies has struck the name of a defunct company off the register under s. 7 of the Companies Act, 1880, the proper remedy of a creditor is to petition for a winding-up order. In such a case neither the provisions as to service of the petition contained in the rules of 1890, nor the provisions as to service contained in the Act of 1880, apply, but special directions as to service must be obtained.

THE company was incorporated, with limited liability, in 1888, its registered office prior to its dissolution under s. 7 of the Companies Act, 1880, being at 1, Tokenhouse Buildings, London, E.C. At the date of its dissolution certain arrears of calls on its shares were due. The company was struck off the Register of Joint Stock Companies in 1896, under s. 7 of the Companies Act, 1880. (1)

(1) 43 & 44 Vict. c. 19, s. 7: “(1.) Where the Registrar of Joint Stock Companies has reasonable cause to believe that a company, whether registered before or after the passing of this Act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

“(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the registrar, and that if an answer is not received to the second letter within

one month from the date thereof, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

“(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto, the registrar may publish in the *Gazette* and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shewn to the contrary, be struck off the register and the company will be dissolved.

“(4.) At the expiration of the time mentioned in the notice the registrar

A petition was presented in 1897 by a creditor of the company asking that the company might be wound up by the Court.

Prior to the hearing of the petition the petitioner took out a summons asking that service of the petition might be effected on the company by sending a copy of it, with a copy of the order for service, through the post in a prepaid letter to a gentleman who was one of the directors and the chairman of the company at the date of its dissolution, and whose address was 2 and 3, Birchin Lane, E.C.

The registrar made an order in the terms of the summons.

The petition shewed that one C. Smith was a shareholder in the company, and that from him was due the greatest amount for calls and premiums.

The petition came on for hearing on October 27, 1897.

Whinney, for the petitioner. Sub-sect. 4 of s. 7 of the

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may, unless cause to the contrary is previously shewn by such company, strike the name of such company off the register, and shall publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

“(5.) If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the superior Court in which the company is liable to be wound up; and such Court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company

to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off.

“(6.) A letter or notice authorized or required for the purposes of this section to be sent to a company may be sent by post addressed to the company at its registered office, or, if no office has been registered, addressed to the care of some director or officer of the company, or if there be no director or officer of the company whose name and address are known to the registrar, the letter or notice (in identical form) may be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in that memorandum . . .”

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Companies Act, 1880, preserves the liability of every director, managing officer, and member of a company struck off the register under the section, notwithstanding the company is dissolved. The liability must have been preserved to enable creditors to obtain payment, and they can only do so by means of a winding-up order.

Assuming a winding-up order can be made, the question arises, how should the petition be served?

The petitioner has obtained such an order for service as would be sufficient in the case of a company which had not been dissolved.

[VAUGHAN WILLIAMS J. You refer me to the steps to be taken in the case of a living company. Sub-s. 6 refers to the service of certain notices in the case of a dead company.]

Sub-s. 6 seems to refer only to the letters and notices mentioned in the earlier parts of the section.

[VAUGHAN WILLIAMS J. If that is so, the clause does not help you. In the case of a living company the relation of principal and agent is regarded in making orders for substituted service; but the director served by post in this case cannot be the agent of a dead company. You ought rather to serve one of the shareholders; and I think the service ought to be personal, if that is practicable.]

Smith, who was a shareholder, is out of the jurisdiction.

VAUGHAN WILLIAMS J. I shall probably make the order, but subject to an affidavit that Smith is out of the jurisdiction, and that the chairman was carrying on business at the address mentioned in the summons at the time of the service. In future I think the order for service ought to be in a different form.

Nov. 3. *Whinney* produced an affidavit by a clerk to the petitioner's solicitors stating that he had had inquiries made as to Smith's whereabouts, and had ascertained that a letter posted to him at an address in Surrey would always find him, but that he was believed to be abroad, and that his whereabouts could not be ascertained. The affidavit also verified

the fact of the chairman's carrying on business at 2 and 3, VAUGHAN WILLIAMS L.J. Birchin Lane at the date of service.

VAUGHAN WILLIAMS L.J. (1) made the usual winding-up order against the company.

Solicitors: *Bird, Moore & Strode.*

(1) His Lordship was appointed a Lord Justice after the date of the hearing of the petition.

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—

F. E.

WRIGHT J. *In re* THOMAS EDWARD BRINSMEAD & SONS.

1897

Nov. 19.

TOMLIN'S CASE.

[00200 of 1896.]

Company—Winding-up—Contributory—Election to avoid Contract to take Shares—Effect of opposing Winding-up Petition as Contributory—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35—Companies Winding-up Rules, April, 1892, Rule 20, Form 2.

Where a person to whom shares in a company have been allotted has commenced proceedings, before the filing of a winding-up petition against the company, to obtain rescission of the contract (if any) to take the shares, the election thus made by him to avoid the contract is not departed from by his subsequently opposing the petition in the character of a contributory.

G. W. F. TOMLIN on June 25, 1897, took out a summons in the winding-up of Thomas Edward Brinsmead & Sons, Limited, for an order that the list of contributories and the official receiver and liquidator's certificate finally settling the same might be varied by excluding the applicant's name therefrom. Tomlin had been induced to apply for shares in the company by a prospectus issued by or on its behalf, and on July 24, 1896, he signed and sent in the following application:—

“Form of Application for Shares.—Thomas Edward Brinsmead & Sons, Limited.—To the Directors of Thomas Edward Brinsmead & Sons, Limited, 94, Cannon Street, London, E.C.—Gentlemen [Having paid to your bankers the sum of £—— being a deposit of 10s. per share payable on application for —— shares of £5 each in] Thomas Edward Brinsmead & Sons, Limited, I request you to allot me *five hundred pounds in* [that number of] *one hundred* shares, and I agree to accept the same, or any smaller number that may be allotted to me, upon the terms and conditions of the prospectus and memorandum and articles of association of the company. I request you to place my name on the register of members in respect of the shares so allotted to me, and I undertake to pay the further instalments upon such allotted shares as and when the same become due,

provided the total number of shares are applied for, and I undertake to pay in full on allotment.—Ordinary signature, Name (in full), *George William Flowers Tomlin.*—Address, *Dudley Street, Leighton Buzzard.*—Description, *No occupation.* Date, *24th July, 1896.*—If you desire to pay in full on allotment sign the following :—I desire to pay in full on allotment. This form is to be filled up, cut out, and forwarded, together with cheque or cash for the amount payable on application to the bankers, &c., or to the secretary at the offices of the company, 94, Cannon Street, London, E.C.”

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The application was made upon a printed form cut out of a newspaper in which it appeared ; but Tomlin altered the form in ink by striking out the portions which are above inclosed in square brackets, and by adding the words which above are printed in italics.

Tomlin did not sign his name at the end of the words “I desire,” &c., and he never paid any money to the company.

The company shortly afterwards went to allotment, but all the shares in it were not applied for, and only about 11,600 (including those applied for by Tomlin) out of a larger number offered for subscription were allotted. No notice of the allotment was given to Tomlin, but he soon afterwards found that there was something wrong with the company, and on August 17, 1896, he served on the company a notice of motion before North J. under s. 35 of the Companies Act, 1862, for rectification of the register by removing his name therefrom on the ground of misrepresentation in the prospectus. It was admitted by the official receiver and liquidator on the present application that had this motion been proceeded with, and had Tomlin done nothing to prejudice his position, he would have been entitled to the relief claimed. The motion stood over by consent until certain test proceedings of the same nature had been disposed of ; but before these came before the Court a petition was presented to wind up the company. Tomlin gave the usual notice as a contributory in accordance with rule 20 of the Companies Winding-up Rules of April, 1892, and following form 2 under those rules, that he intended to appear and oppose the petition ; and he actually did appear

WRIGHT J. and oppose it. A winding-up order was made by Vaughan Williams J. (1), and the notice of appeal from that order was given on behalf of Tomlin and others. The Court of Appeal dismissed the appeal with costs against the appellants. (2)

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*Norman Craig* (*Herbert Reed, Q.C.*, with him), in support of the application to remove Tomlin's name from the list of contributories. Although the applicant's name was placed on the register of members, no notice of allotment was given to him, and there was no acceptance by him so as to make a binding contract.

Moreover, his application was subject to a condition precedent—that the total number of shares in the company should be applied. That condition was never performed, and on that ground there was no contract.

[WRIGHT J. referred to *Alabaster's Case*. (3)]

Even if there was a voidable contract, the applicant before winding-up elected to avoid the contract, and his appearance in the winding-up proceedings cannot alter the election. I have been referred to the following observations made with reference to the hearing of the winding-up petition of this company:—

“A number of shareholders had repudiated their shares on the ground of misrepresentation, and had taken proceedings to enforce such repudiation. Having thus definitively elected to avoid their contracts, they could have voted [at meetings of the shareholders called by order of the Court] without danger, for ‘if a man once determines his election it shall be determined for ever’ (Com. Dig., Elections, c. 2), so held by the Court of Appeal in *Foulkes v. Quartz Hill Consolidated Gold Mining Co.* (4) in 1884 (Em. Dig., 1884, p. 102).”

The applicant did not attend any meeting, and what he did cannot prejudice the position he originally took up. If there never was a contract, it could not be ratified.

*Frank Russell*, for the official receiver and liquidator. If the application was conditional, the applicant has waived the con-

(1) [1897] 1 Ch. 45.

(2) *Ibid.* 406.

(3) (1868) L. R. 7 Eq. 273.

(4) (1883) Cab. & E. 156.

dition. His notice of motion to rectify was not based on the ground that there was no contract, but on misrepresentation entitling him to be relieved from an existing contract. If he had done nothing further, beyond persisting with his motion, he would have been entitled to relief. But in his notice of intention to oppose the petition he stated the number of shares held by him, and that he was a contributory. He could not claim to be a creditor, as he had paid nothing to the company. The giving of this notice, together with the part he took at the hearing of the petition and with reference to the appeal, shews that the applicant elected to be and remain a contributory. He cannot be allowed at one time to say he is a contributory and at another time that he is not, just to suit his own purposes. Nor can it be laid down as a broad proposition of law that an election once made can never be altered or withdrawn.

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In *Foulkes v. Quartz Hill Consolidated Gold Mining Co.* (1), after issue joined and notice of trial given in an action by a shareholder to have his name removed from the register of shareholders on the ground of fraud, the plaintiff attended and voted at a meeting of shareholders held in the liquidation of the company, and it was decided by Pollock B. that the shareholder's conduct debarred him from prosecuting his action for fraud; but the following note appears at the foot of the report: "The Court of Appeal reversed the above decision, holding that the issue of the writ was a definitive election to rescind, and that this election was not affected by the subsequent voting at the meeting."

The doctrine contended for is too wide, and requires qualification. Correctly stated, it is that the election cannot be departed from without the consent of the other party to the contract: *Ex parte Edwards* (2); *Reid v. London and Staffordshire Fire Insurance Co.* (3).

WRIGHT J. The case has been argued ably and concisely; and I think that no point has been overlooked. The applicant,

(1) Cab. & E. 156.

(2) (1891) 64 L. T. 561.

(3) (1883) 53 L. J. (Ch.) 351.



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WRIGHT J. in July, 1896, applied for shares, altering the printed form of application by inserting a proviso which must, I think, be taken to be general in effect, and to affect the whole of the previous words. It was, therefore, a conditional application for shares. The whole of the shares were not allotted, and the condition, therefore, was not complied with. The shares applied for by the applicant were allotted to him; but no notice of allotment was given to him, and he has never paid the company anything in respect of the shares. He soon discovered that there was something wrong with the company; but whether he knew that the total amount of shares had not been allotted, or based his objection on another ground, is not apparent. In August, 1896, he served notice of motion under s. 35 of the Companies Act, 1862, for rectification of the register on the ground that he had applied for the shares on the faith of misrepresentations in the company's prospectus, and in his notice of motion he did not rely on the ground of non-performance of the condition on which he applied for shares. The motion by consent stood over to abide the result of some test cases, and in due course the test motions would have come on. But the motions were cut short by the presentation of a petition to wind up the company. The applicant cannot, therefore, be said to have been in default prior to the hearing of the winding-up petition. But he gave notice of his intention to appear as a contributory at that hearing and oppose the petition. There was, however, nothing in that amounting to a deliberate election to be a shareholder if he was not already one, or to alter the applicant's position. He also appeared at the hearing and opposed, and was a party to the appeal from the decision, but he never voted at any meeting of shareholders. There was no contract at first between the applicant and the company—that is, prior to notice (if any) of the fact of allotment being communicated—because the application was subject to a condition which was never complied with, or, so far as the evidence goes, waived. It is said that it was waived by the attendance of the applicant in court, and by his notice of motion to rectify, and that the appearance in court amounted to adoption of the contract. I must, however, hold that the applicant did not intend to render himself liable for the

shares ; throughout he was endeavouring to obtain relief from liability. When he gave his notice of motion, he probably did not know that he could escape on the ground of non-compliance with the condition ; but, in my judgment, he has done nothing to estop himself from denying that he was a shareholder. Indeed, I do not see what else he could have done ; and, in my judgment, he is entitled to have his name taken off the list of contributories. It is unfortunate that the decision of the Court of Appeal in *Foulkes v. Quartz Hill Consolidated Gold Mining Co.* (1) was not fully reported, as it is a very important one ; but I doubt whether the Court meant to lay down the rule so absolutely as is stated in the note to the report. I do not think that note goes quite so far as the note in Mr. Palmer's book.

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Solicitors for applicant : *Beall & Co.*

Solicitors for official receiver and liquidator : *Day, Russell & Co.*

(1) Cab. & E. 156.

F. E.

WRIGHT J. *In re* INTERNATIONAL SOCIETY OF AUCTIONEERS  
AND VALUERS.

1897

Nov. 18;  
Dec. 3.

BAILLIE'S CASE.

[00262 of 1896.]

*Company—Winding-up—Contributory—Alleged Contract of Membership—  
Error of Subscriber as to Identity of Company.*

Shortly before November, 1895, B. took steps with a view to becoming a Fellow of an old-established society called "The Auctioneers' Institute of the United Kingdom." In November, 1895, X., an officer of a recently incorporated society (with unlimited liability) named "The Institute of Auctioneers and Valuers," called on B. and asked him to become a member of it. B. believed the new society to be the old one, and in this belief, which was known to and fostered by X., B. applied for membership in the new society, and received a certificate of membership. In answer to his subsequent inquiries of the new society, untruthful statements were made to B. which resulted in his remaining in his error as to the identity of the society:—

*Held*, that the principle of *Cundy v. Lindsay*, (1878) 3 App. Cas. 459, applied; that there was not even a voidable contract to become a member, but no contract at all; and that B. was entitled to have his name removed from the list of contributories in the winding-up of the new society, although he had not before the winding-up commenced taken any step to have it declared that he was under no liability.

C. BAILLIE, some months before November, 1895, applied for admission as a Fellow of an old-established society called "The Auctioneers' Institute of the United Kingdom," the office of which was in Chancery Lane, London, E.C. This society was generally called "The Institute of Auctioneers," or "The Auctioneers' Institute." Baillie was too busy to comply with the conditions required before admission, and let the matter drop.

In November, 1895, one Wilkinson, a person who was then the president of an unlimited society called "The Institute of Auctioneers and Valuers," also carrying on business in Chancery Lane, and only recently incorporated, called on Baillie with a prospectus of that company and asked him to join it.

Baillie asked Wilkinson whether he came from the Auctioneers' Institute, and was told that he did. Baillie referred

to his application of some months since, and Wilkinson replied that the institute regretted that they had not accepted Baillie's application without the signatures required, and hoped he would reconsider the matter as the signatures were no longer necessary. Wilkinson gave Baillie a form of application for membership, and was asked to call again. Shortly afterwards he did so, spoke of the institute as if it had been in existence for several years and was well known, and said there was no liability beyond the annual subscription. Baillie, believing him, signed the application form and paid the entrance fee and subscription.

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Shortly afterwards Baillie received a certificate of membership in the new society. At the head of the certificate were the words "The Institute of Auctioneers and Valuers," and it was under the seal of the company which bore the same name, with "Incorporated" by itself in the centre.

Baillie returned this certificate to the secretary in a letter stating that he became a member on a representation that the liability was limited to the annual subscription; that the certificate was not marked "limited"; that the certificate therewith was returned for rectification of the omission; and that if the institute was not limited, he wished to be so advised, adding, "and I at once resign, as I would not be connected with any company with unlimited liability, and I instruct you to remove my name from your list of members if it is not limited."

In a few days the certificate was sent to Baillie with the word "Limited" printed on it after the name of the institute, in a letter stating that the omission of the word was a printer's error.

In subsequent correspondence Baillie asked whether the institute was the one which had been established some years since; and in January, 1896, he was informed by letter that the institute had been established for several years.

The new society was in fact only incorporated in November, 1895, and it changed its name to that of "The International Society of Auctioneers and Valuers" in consequence of proceedings taken against it by the Auctioneers' Institute of the

WRIGHT J. United Kingdom. On December 7, 1896, and after this change of its name, a winding-up order was made against it.

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The official receiver and liquidator placed Baillie's name on the list of contributories, and Baillie took out a summons to have his name removed therefrom.

In his evidence he alleged that he was deceived by the false statements at the interviews and in the letters purporting to come from the Institute of Auctioneers and Valuers, and thereby led to, and did, believe that he was dealing with the old society, which he had since found to be the Auctioneers' Institute of the United Kingdom, and that otherwise he would not have applied for membership or made the payments above mentioned.

*Heber Hart*, in support of the summons. The official receiver and liquidator relies on there being no repudiation of liability before winding-up commenced. That would be a fatal objection if there was an existing contract to become a member, voidable on the ground of misrepresentation; but in this case there is no contract at all. The applicant mistook the company with which he was purporting to make a contract. In *Cundy v. Lindsay* (1) one Blenkarn, by the form of the signatures to letters written by him, and by the mode in which his letters to some people called Lindsay were made out, and by the way in which he left uncorrected the mode and form in which he was addressed by them, intentionally led them to believe that the person with whom they were communicating was not the "dishonest and irresponsible" Blenkarn, but a well-known and solvent house of Blenkiron & Co. doing business in the same street. And it was held that the consequence was the same as if the signature of Blenkiron & Co. had been forged, and that there was no contract between the Lindsays and Blenkarn. Here Baillie, by the deception of the liquidating company's officers who dealt with him, was led to believe that he was dealing with the old-established institute—an entirely different body—and no contract of membership ever existed.

The fact that winding-up took place before repudiation does.

(1) 3 App. Cas. 459, 465. ]



not prevent Baillie from shewing that he never entered into a contract with the liquidating company: Buckley on the Companies Acts, 7th ed. p. 136. [He also referred to *Beck's Case* (1); *Boulton v. Jones* (2); Pollock on Contracts, 6th ed. p. 449.]

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*Clauson*, for the official receiver and liquidator. Baillie undoubtedly contracted with the company which is now in liquidation. It may be that if he had come sooner he could have had his contract rescinded on the ground that he was induced to enter into it by misrepresentation. But there is in existence an actual contract in writing. That contract, if voidable at one time, cannot be impeached now, after a winding-up order has been made against the company: *In re Scottish Petroleum Co.* (3)

*Heber Hart*, in reply, referred to *Alabaster's Case* (4); *McNiell's Case.* (5)

*Cur. adv. vult.*

Dec. 3. WRIGHT J. This was a company incorporated without limitation of liability under the name of "The Institute of Auctioneers and Valuers" with an address in Chancery Lane, but this name was changed in consequence of proceedings taken by "The Auctioneers' Institute of the United Kingdom," whose address was also in Chancery Lane. A winding-up order was made against the liquidating company on December 7, 1896; and on January 11, 1897, a Mr. Lee applied for leave to proceed with an application to remove his name from the register of shareholders on the ground that he never agreed to become a member, and that if he did agree the agreement was induced by fraud. On January 19 a meeting of the contributories was at their request adjourned by the official receiver in order to allow them to take concerted action to contest their liability, and it has been conceded that the present applicant has proceeded without undue delay. On January 24, 1897, the official receiver issued his summary and observations shewing liabilities 1879*l.* 7*s.* 3*d.*, and estimated net assets nil.

(1) (1874) L. R. 9 Ch. 392.

(3) (1883) 23 Ch. D. 413.

(2) (1857) 2 H. &amp; N. 564.

(4) (1868) L. R. 7 Eq. 273.

(5) (1870) L. R. 10 Eq. 503.

WRIGHT J. On February 13 the list of contributories was settled, and on <sup>1897</sup> May 18 the present applicant took out his summons for the removal of his name from the list. On May 25 the official receiver made his further report, under s. 8 of the Act of 1890, to the effect that in his opinion fraud upon the persons induced to join the company had been committed by the promoters of it. [His Lordship then referred to the other facts of the case, and continued :—]

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Under these circumstances, is Baillie to be allowed to repudiate his liability, or rather to say that he never contracted with the company now in liquidation? In my judgment the case is governed by the principles laid down in *Cundy v. Lindsay*. (1) The evidence satisfies me that there never was a contract between Baillie and the company voidable by him on the ground of the misrepresentations which were made to him, but something which was void ab initio. In other words, there never was any contract at all. When Baillie made his application and received his certificate he thought that the company he was dealing with was the old Auctioneers' Institute, and those who were acting for the liquidating company knew of this belief and distinctly deceived him. Under circumstances like these there is no contract, as is shewn by the observations of Lord Cairns, Lord Hatherley, and Lord Penzance in *Cundy v. Lindsay*. (1) That being so, Baillie is entitled to the relief which he claims, and it is no objection to his claim that he took no steps to have it declared that he was not under liability before the winding-up took place. It has been suggested that, whatever the effect of *Cundy v. Lindsay* (1) may be where the contract is not in writing, where the terms are contained in writing the parties cannot deny that there was a contract. In *Cundy v. Lindsay* (1) what was alleged to be a contract appears to have been in writing. But whether I am right in that view or not, there is not in this case a contract in writing, because there is no contract at all.

Solicitor for applicant : *W. Eley*.

Solicitors for official receiver and liquidator : *Riddell, Vaizey & Smith*.

(1) 3 App. Cas. 459, 465.

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Nov. 18, 19.

*Will—Construction—Dividends—Public Company—Apportionment—Income or Capital—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 5, 7.*

Every company registered under the Companies Act, 1862, is a public company within the meaning of the term in the Apportionment Act, 1870.

A bequest of shares in a limited company, coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, operates as an exclusion of the Apportionment Act.

A testator bequeathed certain shares in a limited company to trustees upon trust to sell, with a power of postponement, and stand possessed of the proceeds and the shares remaining unsold upon trust to receive the annual produce thereof and hold the same in trust for the testator's children and remoter issue in succession, and declared that every share bequeathed by his will should carry the dividend accruing thereon at his death. The dividends were payable annually:—

*Held*, that the trustees took the whole of the dividend for the year in which the testator died without apportionment, and that such dividend was payable as income to the tenants for life under the will.

THIS was an appeal from a decision of Kekewich J.

John Lysaght, the testator in the action, was at the date of his will and of his death the holder of nearly the whole of the ordinary shares and of the greater part of the preference shares in John Lysaght, Limited. The testator made his will on January 15, 1895, and died on October 1, 1895.

The will provided as follows: Clause 4. "I bequeath unto my trustees hereinbefore mentioned 350 ordinary shares of 50*l.* each (fully paid) in the company of John Lysaght, Limited, upon trust that my trustees shall sell all or any of the same shares as and when my trustees shall think fit (with express power to postpone the sale of all or any of them for such period as they shall think proper without being answerable for any loss which may result from the exercise of their discretion) and stand possessed thereof and of the investments for the time being representing the same and of the shares for the time being unsold upon trust during the joint lives of my said son

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Arthur Royse Lysaght and my grandson John Lisle Lysaght (son of the said Arthur Royse Lysaght) to receive the annual produce thereof and hold the same as to an annual sum of 300*l*. part thereof upon trust for my said grandson and as to the residue thereof upon trust for my said son Arthur Royse Lysaght and upon trust after the death of either of them my said son and grandson for the survivor of them and if my said grandson shall be the survivor and shall die under the age of twenty-one then on his death I direct that the said shares moneys and investments shall sink into and form part of my residuary personal estate."

And by the same clause the testator empowered his trustees to provide for the maintenance and education of his said grandson during his minority out of the annual sum of 300*l*., and directed them to accumulate the balance.

By clauses 5 and 16 the testator made further bequests of ordinary shares in the company not material to be considered in the present action. Clause 18 provided that the shares bequeathed by clause 5 should be taken subject to a right of pre-emption which, by the articles of the company, had been conferred upon the testator and his representatives. The clause then continued as follows: "I declare that every share in the said company of John Lysaght, Limited, hereby bequeathed shall carry the dividend accruing thereon at my death." The will then proceeded as follows: Clause 19. "I bequeath unto my trustees hereinbefore named the remainder of my ordinary shares and all my preference shares in the said company of John Lysaght, Limited, and also all moneys which shall be owing to me by the said company together with the benefit of all securities for the same moneys or any of them upon trust as and when my trustees in their discretion shall think fit to sell all or any of the said shares and call in all or any of the said moneys (with express power to postpone the sale or calling in of all or any of the said shares and moneys for such period as my trustees shall think proper without being answerable for any loss which may result from the exercise of their discretion) and my trustees shall invest the net moneys arising thereby and stand possessed thereof and of the investments for the time

being representing the same and also of all such shares unsold and of all such moneys outstanding for the time being upon trust to receive the annual produce thereof and subject to reserving thereout one-half the excess when and as often as such annual produce shall in any year exceed the sum of 30,000*l.* shall hold such annual produce upon the trusts and subject to the powers and provisions hereinafter declared and contained of the income of my residuary moneys."

By clause 20 the testator empowered his trustees to apply all or any of the income by the last preceding clause so directed to be reserved in making advances to the said company upon the security of debentures, and subject thereto directed that the said reserve fund should be invested as thereafter mentioned, and he continued as follows: "And I declare that the annual produce thereof shall be deemed income and that such capital moneys and income shall respectively be held upon the trusts and subject to the powers and provisions hereinafter declared and contained of and concerning my residuary moneys and the income thereof respectively."

By clause 21 the testator devised and bequeathed his residuary real and personal estate upon trust for sale and conversion, and to hold the proceeds in trust for his children living at his death (except as therein mentioned) in equal shares, with a proviso that the share of each child should be held upon trust to pay the income thereof to such child for life (and in the case of daughters without power of anticipation), and after the death of such child as to both capital and income in trust for the issue of such child as he or she should by deed or will appoint.

It was the usual practice of the company of John Lysaght, Limited, to hold its annual general meeting in March or April, when the dividends up to the preceding December 31 were declared and paid. At the annual general meeting held on April 22, 1896, dividends for the whole of the preceding year were declared on both preference and ordinary shares.

The question arose upon the will of the testator, both as to the 350 ordinary shares bequeathed by clause 4, and as to the preference and remaining ordinary shares bequeathed by clause 19, whether the dividends declared on April 22, 1896,

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ought to be treated as income or capital, and whether there ought to be any apportionment, and a summons was taken out by the executors and trustees of the will to have that question determined.

Kekewich J. held, upon the construction of clause 18, that the whole of the dividends in question ought to be treated as capital of the testator's estate, and applied accordingly.

A. R. Lysaght and four of the remaining five children of the testator appealed.

*Warrington, Q.C.*, and *Hull*, for the appellants. Apart from the Apportionment Act, 1870, and without the specific direction in clause 18, the whole of the dividend for 1895 would have gone to the tenants for life, the first takers, as the whole of the income of these shares was given to them, and if sold they would be entitled to the income of the produce. There is nothing in clause 18 or in the rest of the will suggesting that this income should be capitalised; and in fact, when the testator intended income to be capitalised he knew how to do it (see clause 20).

The effect of clause 18 is that the testator has effectually excluded the Apportionment Act by specifically bequeathing that part of the dividend which the Act would have made capital. The result is that the tenants for life are entitled to the whole of the dividend as income.

[They contended further that the company of John Lysaght, Limited, was not a public company within the Apportionment Act; but the Court intimated that the point was not maintainable, and it was not pressed. They cited *In re Cox's Trusts* (1), *Browne v. Collins* (2), *Tyrrell v. Clark* (3), and *In re Griffith*. (4)]

*Renshaw, Q.C.*, and *Christopher James*, for infant children of the tenants for life who were made representatives of the class. By clause 18 the shares carry the dividend, not to the tenants for life, but to the trustees. The dividend is part of the share, and is capital. In each case the trustees are directed to sell the same, i.e. the shares plus the accrued dividend, and

(1) (1878) 9 Ch. D. 159.

(3) (1854) 2 Drew. 86.

(2) (1871) L. R. 12 Eq. 586.

(4) (1879) 12 Ch. D. 655.

all that the tenants for life are entitled to is the income of the produce, which includes the accruing dividend. Clause 18 capitalised the dividend, and if a sale took place before April, 1896, it is clear that the tenants for life would get no part of this accrued dividend. That clause takes the accruing dividend away from the residue, into which it would otherwise fall, and makes it part of the share.

Secondly, supposing clause 18 does not capitalise the dividend, there must be an apportionment between the tenants for life and the remaindermen, and the tenants for life are entitled to that part of the dividend only which accrued between the testator's death and the end of the year.

*Hull*, in reply.

LINDLEY M.R. The question which we have to determine is whether certain dividends which were declared in April, 1896, in respect of the year 1895, in which the testator died, belong under the trusts of this will to the tenants for life, or whether they ought to be capitalised. [His Lordship referred to clauses 4, 5, and 19, and read the declaration at the conclusion of clause 18.]

What is the meaning of that? The effect of it, as I understand it, is that so much of the dividend as was declared in April, 1896, as but for this clause would go to the residuary legatees, is not to go to them, but is to go to the legatees of the shares. That is, in my opinion, a stipulation, within the meaning of s. 7 of the Apportionment Act, that no apportionment shall take place. The word "stipulation" is a very bad one to use in the Apportionment Act; but, having regard to the interpretation put upon similar language in a similar Act by *Kindersley V.-C.* in *Tyrrell v. Clark* (1), this clause is plain enough. There is to be no apportionment between the legatees of these shares and those who take the residue. That gets rid of the Act entirely.

The question, then, is whether the testator has by his will given these dividends in terms to the tenants for life, or has declared them to be capital. He has not capitalised them by

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clause 18. The meaning of that clause is that which I have stated, and we must look at other clauses in the will which refer to what is to be done with the shares and the accruing dividends.

The first is clause 4, which relates to the 350 ordinary shares. The testator bequeaths to his trustees 350 ordinary shares upon trust to sell the same at their discretion with an express power of postponement, and to stand possessed thereof, and of the investments for the time being representing the same, and of the shares for the time being unsold, upon trust during the joint lives of his son Arthur and his grandson John to receive the annual produce thereof, and to hold the same as to 300*l.* upon certain trusts, and as to the remainder on certain other trusts.

What is the meaning of the expression “to receive the annual produce thereof”? I cannot read that as excluding this accruing dividend; on the contrary, it seems to me to include it. I can see no reason for cutting it down. If that is so, it appears to me that the case is at an end. I have listened to Mr. Christopher James’s ingenious argument, but it does not seem to throw any light upon what is to be done if the shares are unsold. The trustees are to receive the annual produce thereof, that is, including this dividend, and apply it as provided in this clause 4. There is no question here about the Apportionment Act. The object of this clause is to determine what is to happen as between tenant for life and remainderman; and, in my opinion, the effect of it is that this dividend is to go to the tenant for life.

Then, by clause 19, the testator bequeaths the remainder of his ordinary shares and all his preference shares. These shares are given in the same way to trustees upon trust to sell and then to invest the money arising from the sale, and to stand possessed of the investments and of the shares remaining unsold for the time being upon trust to receive the annual produce thereof—the very same expression that occurs in clause 4. That appears to me clearly to include the accruing dividends. Here, again, there is no question of apportionment. The testator directs what is to be done with the shares and the

annual produce thereof, and he says that the annual produce thereof is to go to the tenant for life.

I think the learned judge has attached to clause 18 a meaning which I cannot find there. He thought that clause 18 really capitalised the accruing dividend. In my opinion, it does nothing of the kind. I think, therefore, that the learned judge was wrong in that respect, and that this appeal must be allowed. There must be a declaration that the whole of the dividends on the shares bequeathed by clauses 5 and 19 of the will must be treated as income and applied accordingly.

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CHITTY L.J. I agree. The 18th clause does not capitalise the dividend accruing at the testator's death. That seems to me to be the principal ground on which the decision of the learned judge was rested, and I cannot see any foundation for it. The 18th clause is not a definition clause making the accruing dividend part of the share, so that the share would include the accruing dividend. If that were so it would have been a capitalising clause. The object is to exclude under the Apportionment Act the claim which otherwise the residuary legatees as a whole would have had to that part of the dividend accruing for the nine months up to the testator's death. The clause simply says that the share is to carry the dividend thereon accruing at the testator's death. Turning to the gift of the 350 shares, one must find in that gift and in the trusts which are there set forth, if anywhere, a capitalising of this accruing dividend; but there are no words to do it. On the contrary, the words "to receive the annual produce thereof" appear to me to mean that the trustees are to receive this accruing dividend as part of the annual produce. It is part of the annual produce, and I cannot find a single word in that clause which has the effect of throwing any part of the accruing dividend into capital. The same observations apply to the remainder of the shares bequeathed by clause 19. It is just worth while to mention that in clause 20 there is a capitalising of a portion of the income in express terms, which does not affect this particular case otherwise than by shewing that when the testator intended to accumulate a portion of the income he

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LINDLEY M.R. I desire to add one word as to what is a public company. I thought that the meaning of a public company was settled as long ago as *Macintyre v. Connell* (1), and I take it that any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act.

CHITTY and VAUGHAN WILLIAMS L.JJ. concurred.

Solicitors: *Whites & Co., for Press, Inskip & Press, Bristol.*  
H. B. H.

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*In re* PEVERIL GOLD MINES, LIMITED.

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*Company—Winding-up—Contributory—Right to Petition—Limitation by Articles of Association—Validity—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82.*

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Dec. 1.

The right given by s. 82 of the Companies Act, 1862, to a contributory to petition for the winding-up of the company cannot be excluded or limited by the articles of association of the company.

Decision of Byrne J. affirmed.

MOTION on behalf of two of the shareholders to stay proceedings upon a petition for the compulsory winding-up of the company.

The petition had been presented by a shareholder holding 5000 fully-paid shares. One of the two shareholders held 20 shares, on which 16s. 6d. per share had been paid, and the other held 13,600 fully-paid shares. All the shares were of the nominal value of 1l. each. It was conceded for the purposes of the motion that the petitioner was a contributory who would be entitled to petition, but for clause 164 of the articles of



association, which was as follows: "No petition shall be presented or proceeded with by a member to wind up the company, except and unless (a) by consent in writing of not less than two of the then board, or (b) in pursuance or by permission of a resolution passed by a majority at a general meeting of the company, or (c) the petitioner or petitioners shall hold, or together hold, not less than one-fifth of the then issued capital of the company, upon which all calls shall have been paid."

• It was admitted that the petitioner had not complied with any one of the conditions mentioned in this clause.

The motion was heard before Byrne J. on November 8, 1897.

*Jenkins, Q.C., and W. H. Cozens-Hardy, for the motion.*

*Eve, Q.C., and Eustace Smith, for the petitioner.*

BYRNE J. No objection is taken in point of form to the application, and both parties ask me to decide without regard to the contents and nature of the petition or to any question whether the petitioner is an original allottee or not. The applicants say that clause 164 of the articles disentitles the petitioner to proceed with his petition. Their argument may be shortly summarised thus: The articles of association constitute an agreement between the members of the company, and art. 164 is part of that agreement; there is nothing illegal either at common law or by statute to render such an agreement invalid, and consequently they are entitled to insist on its being observed. For the petitioner (the respondent on this motion) it is contended that the article is invalid, as being in conflict with the provisions of the Companies Act, 1862, and as being against the policy of the Act and against public policy. The memorandum and the articles of association embody the contract between the different members of the company, but those documents must not conflict with the provisions of the Acts regulating the incorporation of joint stock companies. The Act of 1862 confers certain rights upon shareholders, and, amongst others, it provides, by s. 82, that any application for winding up shall be by petition, that "it may be presented by the company, or by any one or more

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creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately." A qualification of the right to petition so conferred is to be found in the Act of 1867, s. 40. The 82nd section of the Companies Act, 1862, undoubtedly confers a right upon any single contributory—and the petitioner in the present case is a contributory within the meaning of the section—to present a petition, and the question really is, whether or not the petitioner has by becoming a shareholder entered into a contract, enforceable either by the company or by other individual shareholders, not to exercise the right which s. 82 *primâ facie* in terms confers upon him. I am of opinion that, although s. 82 only says that a contributory "may" present a petition, it confers a right upon every shareholder just as much as if the terms of the section had been that every contributory should have "the right to present a petition." Apart from the question of public policy, I consider that the terms of the section are intended to confer a right of which a contributory cannot be deprived, either entirely or in a modified way, by the terms of the articles of association, unless upon the footing that by becoming a shareholder the petitioner has done what is equivalent to validly releasing an individual legal right, and I am of opinion that he has not done so. I am confirmed in my view of the true intent and meaning of the section, not only by s. 40 of the Act of 1867, to which I have referred—which had the meaning been otherwise would have been unnecessary—but by the fact that the Act of 1862, when it provides for a discretionary alteration or limitation of the statutory terms of articles of association, so provides in terms, as in the case of s. 52, in relation to voting and summoning meetings, where it is enacted that, "in default of any regulations as to voting, every member shall have one vote, and in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned" if summoned as in the section mentioned. There are no corresponding words in s. 82. In fact, I think that the right to petition to wind up by every single shareholder is a condition of incorporation under the Companies Acts, whatever independent contracts may be separately made

between the company and an individual who happens to be or to intend to become a shareholder, or between individuals who happen to be the shareholders. I am not left without guidance in the matter. It appears to me that I have the authority of the House of Lords in the case of *Welton v. Saffery* (1) for the principle which ought to be applied in this case. It is true that in the present case the article in question is not at variance with the memorandum of association in the same way as it was in that case, but, if it can be shewn that the article is at variance with the Act of Parliament directly, the reasoning applies, if not with greater force, at least in a more direct manner. "If one were to suppose," says Lord Halsbury L.C. (2), "that the whole 6000 original shareholders or persons who became shareholders by purchase in the market were to have agreed that these shares should only be regarded as having 10s. due upon them, each of them might perhaps against himself establish some contract by which the person agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder—it would be in his capacity as individual." And Lord Davey says (3): "Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts." I think that the passages I have quoted apply to the present case. The article which I have to deal with is really an attempt to fix upon the holder of every share an obligation, so to speak, running with the share, in contravention of the provisions of the Act of Parliament. So far as regards the company who are moving parties the case is to my mind quite clear, and, in reply, counsel for the motion hardly insisted upon the right of the company to the relief asked for. If the articles are to be

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(1) [1897] A. C. 299. (2) [1897] A. C. 305. (3) [1897] A. C. 331.

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regarded as part of the terms of the contract between the company and the person applying for shares, I am of opinion that the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or to desire to become a shareholder. This article appears to be one more attempt to remove a statutory safeguard of the inexperienced intending shareholder. Not one per cent. of intending shareholders read the articles before applying for or accepting a transfer of shares, and a shareholder does not expect to find that he has entered into a special contract waiving his statutory rights. I know nothing about the merits of the particular case presented by the petition sought to be restrained, but I am glad to be able to think that the law is as I hold it to be. Having regard to the views I have expressed, it is unnecessary for me to decide the points raised which were founded upon the article being against the policy of the Act or against public policy; but I desire to add that I am far from saying that such points may not be made good. I dismiss the motion with costs.

The petition was ordered to stand over pending an appeal.

F. E.

C. A. The applicants appealed.

The appeal was heard on December 1, 1897.

*Jenkins, Q.C.*, and *W. H. Cozens-Hardy*, for the appellants. It has been decided that articles of association are a contract between the members of the company inter se; it is not quite so clear whether they are a contract between the members and the company. A "member" is a person who has agreed to become a member of the company, and whose name is entered on the register of members: Companies Act, 1862, s. 23. The members are bound by the articles just as if they had covenanted to conform to them: s. 16. (1)

(1) By s. 14: "The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by

Byrne J. held that such a contract as that which is contained in clause 164 cannot legally be contained in the articles, though

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guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." . . .

By s. 16: "The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber. . . . When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act." . . .

Sect. 52: "In default of any regulations as to voting every member shall have one vote, and in default of any regulations as to summoning general meetings a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the Table marked A. in the 1st schedule hereto, and in default of any regulations as to the persons to summon meetings five members shall be competent to summon the same, and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside."

Sect. 79: "A company under this Act may be wound up by the Court as

hereinafter defined, under the following circumstances; (that is to say):—

"(1.) Whenever the company has passed a special resolution requiring the company to be wound up by the Court:

"(2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:

"(3.) Whenever the members are reduced in number to less than seven:

"(4.) Whenever the company is unable to pay its debts:

"(5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

By s. 82: "Any application to the Court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately." . . .

By the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 40: "No contributory of a company under the principal Act shall be capable of presenting a petition for winding up such company unless the members of the company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder." . . .



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the same contract might be validly made in another way with any individual shareholder. But if such a contract is valid, the articles of association are the proper place in which to put it. The learned judge relied upon *Welton v. Saffery* (1) as supporting his view. But he misunderstood the judgments in that case. Sect. 82 confers a right upon creditors and contributors to petition for the winding-up of the company; if a contributory cannot bargain that he will not petition, no more can a creditor. An agreement which purported to oust the jurisdiction of the Court would no doubt be void. An unqualified veto on the right to petition might be bad. In the present case only some limitations or conditions are imposed, and they are not colourable; and such a clause is valid, provided that the conditions are reasonable. They must not amount to a practical prohibition of the right to petition. The articles are a contract between the members inter se with regard to the company and its affairs: *Eley v. Positive Government Security Life Assurance Co.* (2) The articles have by s. 16 the effect of a covenant by each of the members to observe them. It must be a covenant with someone. Each member is entitled to say there shall be no breach of the articles, and he is entitled to an injunction to prevent a breach: *Browne v. La Trinidad* (3) is not a decision to the contrary. It only decides that an outsider is not entitled to an injunction to enforce a provision contained in articles. Any legal stipulation as to the relations between a company and its members, and between the members inter se, may be inserted in the articles, though of course everything must be subject to the provisions of the Companies Act. Sect. 14 says that the articles may prescribe "such regulations for the company as the subscribers to the memorandum of association deem expedient." This leaves the subscribers a free hand, so long as they act within the law.

[CHITTY L.J. Suppose the number of the members of the company was reduced to six; then, according to s. 79, sub-s. 3, the company might be wound up. But clause 164 would prevent any one of the six from petitioning.]

(1) [1897] A. C. 299.

(2) (1876) 1 Ex. D. 20, 88.

(3) (1887) 37 Ch. D. 1.

Sect. 79 only states the grounds upon which the Court may act when it has a winding-up petition before it. Sect. 82 limits the persons who may petition. The right of petitioning which is conferred by s. 82 on creditors and contributories may, like any other statutory right, be waived, unless there is in the statute any provision, express or implied, to the contrary. A creditor may waive any provision for his benefit in the Act; why not a contributory? Byrne J. held that a contract by a member for good consideration not to present a petition to wind up the company for a specified time would be valid. There is nothing in the Act which says that a contributory may not waive his right to petition. Why, then, is an agreement, which is not per se illegal, invalid because it is contained in the articles? In *Welton v. Saffery* (1) the decision of the House of Lords was that a provision in articles authorising a company to issue its shares at a discount was invalid, even as between the shareholders inter se. The Court was there asked to split up a contract into two, one legal and the other illegal, and thus to find a new contract, and it refused to do so. But there is no authority which says that a contract which would be legal, if it were contained in a document outside the articles of association, would be illegal if included in the articles. No such point arose in *Welton v. Saffery*. (1) If a contract is illegal, it must be illegal wherever it is found; and if it is legal, it must be legal wherever it is found. There is nothing express in the Act, and there is nothing to be implied from it, which is contravened by clause 164. It is said that that clause cannot be made part of the constitution of the company. But by s. 14 the articles may prescribe "such regulations for the company as the subscribers to the memorandum of association deem expedient," provided, of course, that the regulations are not contrary to law. If they are not illegal, why should not the regulations be inserted in the articles of association? There is nothing in the Act which says expressly that a shareholder cannot contract himself out of s. 82. Why cannot the subscribers to the memorandum "deem it expedient" to do so? It would be competent to the partners in an ordinary partnership

(1) [1897] A. C. 299.

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to agree that they would not sue for a dissolution except under certain conditions. Such an agreement would not be contrary to common law or to public policy. Sect. 52 is one of a series of clauses which is headed "Provisions for protection of members." In *Walker v. London Tramways Co.* (1) the clause which it was attempted to exclude from the power of alteration given by s. 50 of the Act affected the power of the company itself. In *Hope v. International Financial Society* (2) an attempt was made to oust the jurisdiction of the Court in toto. It has never before been decided that the right of a shareholder to petition for a winding-up is part of the essential constitution of the company. In *Malleson v. National Insurance and Guarantee Corporation* (3) it was held that a company could not by its articles contract itself out of the power to alter its articles, which is an essential part of its constitution. *Ellis v. Dadson* (4) is a similar case, and neither of those decisions applies to the present case. They do not shew that a shareholder cannot release his right under s. 82. It has been held that the right given by s. 161 to a dissentient shareholder to have his interest valued and purchased might be excluded by the memorandum of association: *Cotton v. Imperial and Foreign Agency and Investment Corporation*. (5) The right given to a shareholder to petition for a winding-up is a purely domestic matter—a regulation affecting the relations of the members inter se—and it can, therefore, be dealt with by the articles. The petitioner is bound by clause 164.

Eve, Q.C., and *Eustace Smith*, for the petitioner, were not called upon.

LINDLEY M.R. A very ingenious argument has been addressed to us by Mr. Jenkins, and Mr. Cozens-Hardy has elaborated it, and made it (if possible) plainer than his leader had done. But in my opinion a fallacy lies at the root of the argument. I will begin by reading the following passage from the speech of Lord Macnaghten in *Welton v. Saffery* (6): "These companies are the creature of statute, and by the

(1) (1879) 12 Ch. D. 705.

(2) (1876) 4 Ch. D. 327.

(3) [1894] 1 Ch. 200.

(4) (1891) 60 L. J. (Ch.) 353.

(5) [1892] 3 Ch. 454.

(6) [1897] A. C. 324.

statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act.” Any one who is familiar with the Companies Acts knows perfectly well that these registered limited companies are incorporated on certain conditions; they continue to exist on certain conditions; and they are liable to be dissolved on certain conditions. The important sections of the Act of 1862, with regard to dissolution, are ss. 79 and 82. Sect. 79 states the circumstances under which such a company may be dissolved by the Court, and s. 82 states the persons who may petition for a dissolution. Any article contrary to these sections—any article which says that the company is formed on the condition that its life shall not be terminated when any of the circumstances mentioned in s. 79 exist, or which limits the right of a contributory under s. 82 to petition for a winding-up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid. It is no answer to say that the right to petition may be waived by any contributory personally. I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of the company. That point does not arise now. But to say that a company is formed on the condition that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act is to say that it is formed contrary to the provisions of the Act, and upon conditions which the Court is bound to ignore. The view taken by Byrne J. was right, and the appeal must be dismissed.

CHITTY L.J. I am of the same opinion. We have not now to consider whether an individual shareholder can or cannot

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bind himself not to petition for the winding-up of the company, nor generally how far the provisions of the Act may be modified by the articles of association. In my opinion, this condition is annexed to the incorporation of a company with limited liability—that the company may be wound up under the circumstances, and at the instance of the persons, prescribed by the Act, and the articles of association cannot validly provide that the shareholders, who are entitled under s. 82 to petition for a winding up, shall not do so except on certain conditions. It was admitted in argument that a provision that no creditor or no contributory should petition, or that the company itself should not petition for a winding up, would be invalid. In my opinion, s. 82 has laid down an essential condition, and the articles cannot provide that it shall not be fulfilled. In the present case, the clause only imposes a limitation; but, if we were to hold this limitation to be valid, we could not stop short of saying that the statutory condition may be dispensed with altogether.

VAUGHAN WILLIAMS L.J. I agree, and I have nothing to add.

Solicitors : *White & De Buriatte ; Robinson & Stannard.*

W. L. C.

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[1897 M. 2838.]

*Company—Debenture—Power to Debenture-holder to appoint Receiver—
Fiduciary Power—Jurisdiction of Court.*

A company issued a series of debentures, each of which contained a condition that, at any time after the principal moneys thereby secured should have become payable, the L. Corporation (one of the debenture-holders) might by writing appoint a receiver of all or any part of the property thereby charged. In exercise of this power the corporation, who were also shareholders in the company, appointed a receiver:—

Held, that the corporation were trustees of this power on behalf of all the debenture-holders, and were bound to exercise it in their interest alone, and that as it was shewn that the appointment had been made in the interest of the shareholders, and not in that of the debenture-holders, the Court had jurisdiction to interfere to carry out the trust, and accordingly to appoint its own receiver.

Decision of North J. affirmed.

APPEAL against an order made by Ridley J. (as vacation judge) on October 14, 1897, and a subsequent order made by North J. in chambers on November 15, 1897, consequential on the first order.

The action was brought by a holder of some of a series of debentures, amounting in the whole to 5578*l.*, issued by the above company, the plaintiff suing on behalf of himself and all other the holders of those debentures, against the company, to enforce their security. The Maskelyne Company were incorporated in June, 1896. J. M. Maclean was the chairman of the company, and also of a company called the London and Northern Debenture Corporation, who held shares in the Maskelyne Company. In July, 1897, the company were in want of money, and they applied to the corporation for an advance, which the corporation agreed to make on the terms of having debentures of the company issued to them for the amount of their advance, the bargain being that the debentures

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should contain certain special conditions. Each of the debentures was made a charge upon all the property of the company, and was issued "upon and subject to the conditions indorsed hereon." Condition 3 provided that "all the debentures of this series shall rank *pari passu* as a first charge upon the property as within defined." Condition 4: "The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and on demand of payment by the registered holder hereof—viz. (inter alia) (*d*) If any execution, sequestration, extent, or other process of any Court or authority is sued out against the property of the company for any sum whatever, and is not satisfied or secured within two days." Condition 5: "At any time after the principal moneys hereby secured shall have become payable according to the tenour of this debenture or under these conditions, the London and Northern Debenture Corporation, Limited, or (if that corporation is not then a debenture-holder) the registered holder as within defined of this debenture, may by writing appoint one or more persons to be a receiver or receivers of all or any part of the property hereby charged in like manner in every respect as if such corporation or registered holder were a mortgagee within the meaning of the Conveyancing Act, 1881, and had become entitled under that Act to exercise the power of sale thereby conferred, and every receiver so appointed shall have and be entitled to exercise all powers conferred by the Act, as if such receiver had been duly appointed thereunder, and in particular, by way of addition to, but without hereby limiting, any general powers hereinafter referred to, every such receiver so appointed shall have power to do the following things—viz. (inter alia) (*a*) Take immediate possession of the property or any part thereof; (*b*) carry on any business or businesses of the company." These conditions were inserted in the debentures (for 1174*l.*) issued to the corporation, as well as in all the other debentures of the same series issued by the company, of which debentures to the amount of 1870*l.* were issued to Frederick Stuart, the plaintiff in this action, in respect of advances which he had made to the company. All the debenture-holders of this series

had thus notice of the special condition as to the appointment of a receiver on which the corporation had insisted.

On September 30, 1897, a petition to wind up the company was presented by the corporation as shareholders. This petition was afterwards withdrawn. In October a creditor recovered judgment against the company and levied a distress on the company's property. This distress was not satisfied or secured within two days. On October 4 the company passed a resolution to wind up voluntarily, and this resolution was afterwards confirmed on October 20, and Alfred Akers, the secretary of the company, was then appointed voluntary liquidator. On October 6 Stuart demanded payment by the company of his debentures, and, payment not being made, he on the same day issued the writ in this action, on behalf of himself and all other the holders of first debentures issued by the company, to enforce their security. He gave notice of motion for the appointment of a receiver, and on October 13 this motion was in the list for hearing by Ridley J. as vacation judge, but was not reached. On October 14 the corporation demanded payment of their debentures, and payment not being made they, on the same day, in exercise of the power conferred on them by the debentures, appointed a receiver. He went into possession, and so remained until he was displaced by an order of North J., as will presently appear. At a later hour on October 14 the plaintiff's motion for the appointment of a receiver was heard by Ridley J. The corporation had not been served with notice of the motion, but counsel was present on their behalf, and he as *amicus curiæ*, informed the Court of the appointment of Akers as receiver, and suggested that the Court had no jurisdiction to appoint a receiver. The learned judge said that under these circumstances he could not appoint a receiver. It was then suggested that he should appoint Akers receiver, which he accordingly did, making an order which appointed him receiver upon his giving security, and also appointing him manager of the company's business. Akers did not consent to this order, but insisted that he was receiver under the appointment made by the corporation. He did not give security as required by the order, but nevertheless he remained in

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possession. On October 16 Maclean wrote to the solicitor of the Maskelyne Company as follows: "I am glad to find that you approved of the appointment of Mr. Akers as receiver. We were reluctant to use our authority as debenture-holders until we were forced to do so by Mr. Stuart, and have only intervened in order to protect our interests as the largest shareholders in the company. These interests are the same as those of the whole body of shareholders. I hope it may still be possible for us to save the concern." On November 1 an order was made by Vaughan Williams J. to continue the winding-up of the company under the supervision of the Court, and C. F. Kemp was appointed liquidator, Akers retiring in his favour. On November 15 North J., upon a summons issued by the plaintiff Stuart, on the ground that Akers had not complied with the order of the Court that he should give security, made an order appointing W. F. Marreco receiver and manager upon his giving security. This having been done, Akers went out of possession. The writ and the statement of claim were amended by making the plaintiff sue on behalf of himself and all other the debenture-holders other than the corporation, and adding the corporation as defendants. The corporation appealed from both the orders of October 14 and November 15.

Vernon Smith, Q.C., and *W. F. Hamilton*, for the appellants. The appellants are entitled to appoint their own receiver under the contract made between them and the company when the debentures were issued to them. Every other debenture-holder had notice from his debenture of this contract. The Court has no jurisdiction, or, at any rate, ought not to set aside the contract: *In re Henry Pound, Son & Hutchins.* (1)

Swinfen Eady, Q.C., and *Whinney*, for the plaintiff. The power given to the corporation to appoint a receiver is of a fiduciary nature, and it should be exercised in the interest and for the benefit of the debenture-holders generally. If it is not so exercised, the Court has power to interfere and to appoint its own officer as receiver. The evidence, and in particular Maclean's letter of October 16, shews that the corporation in

appointing Akers receiver were acting, not in the interest of the debenture-holders, but in the interest of the company and of themselves and the other shareholders in it. Akers is clearly not a proper person to act as receiver otherwise than under the direction and control of the Court.

W. F. Hamilton, in reply. Maclean's letter of October 16 is not evidence against the corporation: *In re Devala Provident Gold Mining Co.* (1) Except in cases of fraud or mistake, or on the ground of public policy, it is not the habit of the Court to interfere with contractual relations. No doubt the Court can control the appointment of a receiver so as to see that a proper person is appointed; but it will not interfere any more than with the appointment of an ordinary trustee, when a proper person is willing to be appointed. The order ought, at any rate, to have been made without prejudice to the rights of the corporation: *In re Henry Pound, Son & Hutchins* (2); *Gaskell v. Gosling*. (3) The plaintiff took his debentures with full notice of the power conferred on the corporation. The corporation have acted *bonâ fide*. They gave valuable consideration for the power, and it would not be "just or convenient" that their receiver should be displaced.

LINDLEY M.R. The whole case, as it appears to me, really turns (1.) upon the admissibility in evidence of the letter of October 16, 1897, and (2.) upon the true inference which is to be drawn from that letter, if it is admitted. But I must first say a few words upon what I may call the "bargain" between the parties. The bargain between the parties—and by this I mean between the debenture-holders themselves as well as between them and the mortgagor company—was this. The mortgagor company, that is, the Maskelyne Company, wished to borrow some money, and they issued debentures to (amongst others) the London and Northern Debenture Corporation, and it was part of the bargain between that corporation and the Maskelyne Company that the corporation should, if the debenture money became payable, have the right to appoint a receiver.

(1) (1883) 22 Ch. D. 593.

(2) 42 Ch. D. 402.

(3) [1896] 1 Q. B. 669.

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As between the Debenture Corporation and the mortgagors there is nothing more to be said. The corporation have that right, and they bargained for it. But we have to consider this: On whose behalf was that right to appoint a receiver conferred? It was not conferred on the Debenture Corporation for their own exclusive benefit, for it was part of the bargain between them and the other persons who advanced money upon other debentures that the whole issue of the debentures should rank *pari passu*. Condition 3 provides that "All the debentures of this series shall rank *pari passu* as a first charge upon the property as within defined." Therefore, this power for which the Debenture Corporation have stipulated is one which they are bound, as between themselves and the other debenture-holders, to exercise for the advantage of all the debenture-holders. They cannot do as they like with it. They are trustees of this power or right to appoint a receiver for themselves and others. Now it so happens—and this is the peculiarity of the present case—that there is a quarrel between the Debenture Corporation and those others for whom they are trustees. The plaintiff Stuart is the holder of some of the debentures, and he says: "Although you, the Debenture Corporation, have a right to appoint a receiver, a right which it would be extremely difficult, if not impossible, for the mortgagors to control, I have a right to control it, if I find that you are exercising your power, not for the benefit of myself and the other debenture-holders, but for the benefit of the mortgagor company, or of yourselves as shareholders in that company." His case is unanswerable in point of law and principle if what he alleges be true—if it be true that the corporation are exercising this power of appointing a receiver, not in the interest of their co-debenture-holders, but in the interest of their mortgagors, and in their own interest as shareholders in the mortgagor company. In such a case as that the jurisdiction of the Court to interfere seems to me beyond all question. It would not be interfering contrary to the bargain between the parties—quite the reverse; it would be interfering to enforce the bargain according to the good faith and real meaning of it; and Mr. Stuart is perfectly justified (if he can make out his case) in coming to the Court

and saying, "Control the Debenture Corporation in the exercise of their power of appointing a receiver, and appoint a receiver for the benefit of them and all other the debenture-holders. In other words, carry out the bargain between me and the other debenture-holders and the Debenture Corporation [according to its true meaning and construction." That is the plaintiff's case, and it is unanswerable if he can prove it. Now, what is the proof of it? The proof of it, according to the plaintiff, is this. He says Mr. Maclean is the chairman of the Debenture Corporation, and he manages these proceedings on their behalf—he is their agent in these matters. Is that true—is there evidence of it? Reading Mr. Maclean's two affidavits together (and I have done this with care), I find that he is the person who has been acting for the Debenture Corporation in giving instructions for the proceedings which have been instituted and carried on on their behalf. He is, therefore, their agent for the purpose of conducting these litigations. I do not, of course, mean professionally, but for giving instructions to solicitors on their behalf. Then we find Mr. Maclean writing on October 16, 1897, a very extraordinary letter to the solicitors of the Maskelyne Company. We must bear in mind that on October 14, 1897, the Debenture Corporation had, pursuant to the power conferred upon them by the debentures, sent in to the company a demand for payment of their debentures, and had appointed Mr. Akers receiver. Upon the same day Ridley J. had appointed Mr. Akers receiver upon his giving security. Bearing in mind, then, what the Debenture Corporation had done, by the authority and instructions and at the instigation (I do not doubt) of Mr. Maclean, we find him on October 16 writing this letter to the company's solicitors. [His Lordship read Mr. Maclean's letter of October 16, as above quoted, and continued:—]

This letter convinces me that Mr. Akers was appointed receiver by the Debenture Corporation not in the interest of the debenture-holders at all. I regret that Mr. Maclean, who is abroad, has not had an opportunity of commenting upon this letter; but we can only act upon the evidence before us, and upon that evidence it appears to me that the case alleged by

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Mr. Swinfen Eady is absolutely proved; and if so, it is not only within the jurisdiction of the Court, but it is right and proper for it to say to the Debenture Corporation, "You have exercised your power, not *bonâ fide* for the purpose of protecting the interest of your co-debenture-holders, but for a purpose which is adverse to their interest, and it is competent for Mr. Stuart to apply to the Court to exercise its jurisdiction, and it is fit and proper for the Court to exercise that jurisdiction, and to protect Mr. Stuart against such a misuse of the power, by appointing a receiver itself."

I have not the slightest doubt that the case alleged is made out by this letter, and this appeal must be dismissed with costs.

CHITTY L.J. I agree.

This controversy about the appointment of a receiver does not arise between mortgagor and mortgagee, but it arises between the several mortgagees—that is, the several debenture-holders. I think that the jurisdiction of the Court in such a suit as that which we have before us to appoint a receiver—its own officer—to get in and collect the assets under the circumstances which have been proved, is unquestionable. It is said that the Court by appointing its own officer to act as receiver would be in substance setting aside the bargain which has been made between all the debenture-holders. That, I think, is the real point in this case. Now, the power to appoint a receiver which is contained in all the debentures is clearly not to be exercised for the benefit only of the donees—that is, the Debenture Corporation. I have never before seen such a power as this inserted in debentures. Generally speaking, a power of this nature, which is to be exercised for the benefit of the whole body of the debenture-holders, is to be found in a trust deed of some kind. But here, on the face of the debenture itself, it is quite clear that it is not a case in which a sole mortgagee is empowered to appoint a receiver as against his mortgagor so as to escape from the liability of a mortgagee in possession and other liabilities, but the power, agreed to, no doubt, by the mortgagors, was agreed to also by all the debenture-holders,

and it is unquestionably a fiduciary power, and it is essential that it should be exercised for the benefit of all the debenture-holders. It must be exercised *bonâ fide* and for their protection.

That brings me to the point whether the plaintiff has made out his allegation that the power was not well exercised, in the sense of not being exercised for the common benefit of all. I think he has. For the reasons given by the Master of the Rolls, I think the letter of October 16, 1897, is admissible as against the appellants themselves; and the result is, that, their power not having been exercised in the manner which the power itself required, their appointment of a receiver cannot be set up as a bar to the jurisdiction of the Court. No doubt the Court, wherever it finds a contract of this kind, will, in the exercise of its discretionary jurisdiction, pay great attention to it. But it appears to me that such a power does not oust the jurisdiction of the Court, nor does it control it, beyond this—that the Court ought, in the exercise of its discretion, and, according to the circumstances of the case, to pay more or less regard to the power.

For these reasons I agree that the appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors : *Baker, Blaker & Hawes ; Chester & Co.*

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[1897 A. 331.]

Power of Appointment—Special Power—Appointment to one of several Objects of Power—Subsequent Appointment among all the Objects equally—Loco parentis, Person in—Double Portions, Rule against—Legacy—Prepayment in Testator's Lifetime—Satisfaction.

Decision of Stirling J., [1897] 2 Ch. 574, reversed on appeal, it appearing from the evidence that the child to whom appointments of sums amounting to one-third of the fund had been made by deed had in the lifetime of the appointor accepted these sums in prepayment or anticipation of the one-third appointed to her by the will of the appointor.

THIS was an appeal by the defendants, Mrs. Loumyer's trustees, against the decision of Stirling J. (1)

In the course of the argument on the appeal the attention of the Court was directed to two letters, both dated December 12, 1884, one written by Mrs. Mackenzie, the testatrix and appointor, to her solicitor, Mr. J. T. Campbell, one of the appellants trustees, and the other written by her husband, Mr. Mackenzie, also to Mr. Campbell. In her letter Mrs. Mackenzie said: "It was always my intention that my daughter, Mrs. Henry Papillon, should have one-third of the 10,000*l.*, i.e., 1330*l.* odd in addition to th. 2000*l.* already given her by me under my father's will. I was always in hopes she would not have to anticipate the said balance." Mr. Mackenzie wrote: "Mrs. Mackenzie has read your letter re Mrs. Papillon's affairs. Mrs. Mackenzie has sent Mrs. Papillon a note to you in which she agrees to further appropriate 1333*l.*, balance of one-third of 10,000*l.* coming to her under her grandfather's will. You will no doubt see Mrs. Papillon on Monday and arrange the various matters with her as mentioned in your letter." These two letters were exhibited to an affidavit filed by Mr. Campbell in which he stated that, as far as he could recollect the circumstances, it was Mrs. Mackenzie's intention that the two appointments by deed made

by her should be in satisfaction of Mrs. Papillon's share in the 10,000*l.*, so as to leave the balance to become divisible upon Mrs. Mackenzie's death between her other two children; and he quoted an entry made at the time in his attendance-book shewing that on December 22, 1884, he attended Mrs. Papillon and informed her that Mrs. Mackenzie would appoint the further sum of 1333*l.* to make up the one-third of the 10,000*l.* That affidavit was not answered nor were its statements denied by Mrs. Papillon.

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Buckley, Q.C., and *F. Gore-Browne*, for the appellants.

Hastings, Q.C., *W. F. Phillpotts*, and *R. B. Phillpotts*, for the respondents, Mrs. Papillon and her trustees.

G. Henderson, for the respondents, the trustees of Mrs. Mackenzie's will.

THE COURT (Lindley M.R., Chitty and Vaughan Williams L.JJ.) without discussing the question of law dealt with by Stirling J. in the Court below, namely, as to the application of the rule against double portions, decided the appeal solely upon the two letters and the affidavit above mentioned, and came to the conclusion that upon the evidence it was indisputable that Mrs. Papillon had accepted the two appointments of 2000*l.* and 1333*l.* 6*s.* 8*d.* as on account and in prepayment of her one-third of the 10,000*l.* appointed by the will, and was therefore now debarred from insisting to the contrary. Their Lordships treated the case as equivalent to that of a legacy given by will of a sum of money, and of a payment by the testator in his lifetime to the legatee in anticipation. They accordingly allowed the appeal with costs.

Solicitors: *Campbell, Reeves & Hooper*; *Mear & Fowler*; *Ingram, Harrison & Ingram*.

G. I. F. C.

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LADY BATEMAN v. FABER.

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[1896 B. 4943.]

Nov. 29.

*Married Woman—Separate Estate—Restraint on Anticipation—Admission of
Cesser of Interest—Estoppel.*

A married woman was entitled to the income of property during her life, for her separate use without power of anticipation, subject to a proviso that on a specified event her interest should cease, and the property be held in trust for her husband. In order to assist her husband to make an arrangement with a creditor, she executed a deed-poll, whereby she admitted (believing then that it was true, though, as she afterwards alleged, it was not in fact true) that the event mentioned in the proviso had occurred, and that her life interest had determined, and she released that interest in favour of her husband. On the faith of this deed the creditor entered into arrangements with the husband for his benefit. The wife subsequently, notwithstanding the deed, claimed to receive the income of the property during her life :—

Held, that she could not by admission or estoppel or in any other way by her own act get rid of the protection afforded by the restraint on anticipation, and that her right to receive the income was unaffected by her admission contained in the deed-poll.

Decision of Kekewich J., [1897] 2 Ch. 223, affirmed.

APPEAL against the decision of Kekewich J. (1)

By an indenture dated June 26, 1867, and made between Lord Bateman, of the one part, and Sir E. C. Kerrison and R. Ellice, of the other part, Lord Bateman, in consideration of 11,430*l.* advanced to him by Kerrison and Ellice, conveyed to them his life interest in the Kelmarsh and Shobdon Court estates upon trust as a security for the due performance by him of covenants relating to the loan, and subject thereto upon trust to receive the rents and profits, and, after payment of all outgoings, to pay the surplus or residue thereof to the plaintiff (his wife) for the term of her life, for her separate use and without power for her to dispose or deprive herself of the benefit thereof by anticipation. The deed contained a proviso that if at any time the plaintiff should “succeed to an income in her own right of 8000*l.* or more per annum for her separate use, then and in such case the trust” lastly thereinbefore

(1) [1897] 2 Ch. 223.

declared should "absolutely cease and determine," and after the determination thereof the property should be held in trust for Lord Bateman. After the execution of this deed Lord Bateman mortgaged such interest as remained to him in the Kelmarsh and Shobdon Court estates to Andrew Montagu as a collateral security for 110,000*l*.

In July, 1886, upon the death of her brother, Sir E. C. Kerrison, the plaintiff became entitled to a life interest in the Kerrison estates, and she was then advised by her solicitor that she must be considered as having succeeded to an income of 8000*l*. within the meaning of the proviso contained in the deed of June 26, 1867. In order to assist her husband to obtain better terms from Montagu in relation to the loan of 110,000*l*., the plaintiff executed a deed-poll dated March 4, 1890, which, after a recital of the deed of June 26, 1867, and of the appointment of new trustees thereof, proceeded as follows: "Whereas upon the death of the said Sir Edward Clarence Kerrison, which happened on July 12, 1886, I became entitled and succeeded as tenant for life to the Kerrison estates, in the counties of Norfolk, Suffolk, and Middlesex, and am now in the receipt of an income of 8000*l*. or more per annum, and in consequence thereof the hereinbefore-recited proviso contained in the hereinbefore-recited indenture has taken effect in favour of the said Lord Bateman, and of his mortgagee Andrew Montagu. . . . And whereas the said Andrew Montagu has agreed to enter into certain arrangements with the said Lord Bateman on the faith of the cesser of my interest in the surplus rents and profits of the said estates, and of my admission that such interest therein has ceased, and I have accordingly agreed at their request and for the satisfaction of the said Andrew Montagu to make such admission and to execute such release as is hereinafter contained; Now I the said Lady Bateman in consideration of the premises hereby admit that the trust as to my life estate or interest in the surplus rents and profits of the said settled Kelmarsh and Shobdon Court estates has determined under the proviso in that behalf contained in the hereinbefore-recited indenture of June 26, 1867. And I hereby release and quit claim to such surplus rents and profits, to the

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intent that the "existing trustees "may hold the same as a security for the performance and observance by the said Lord Bateman, his heirs, executors or administrators, of the covenants " contained in the deed of June 26, 1867, "and subject thereto upon the trusts of the said indenture of June 26, 1867, other than those for the payment to me the said Lady Bateman of the said surplus rents, freed and discharged from all claims and demands of me the said Lady Bateman in respect of such surplus rents."

Subsequently to the execution of this deed-poll and in consequence thereof, Andrew Montagu entered into agreements with Lord Bateman whereby the rate of interest on the loan of 110,000*l.* was reduced, and arrangements were made for payment on terms beneficial to Lord Bateman.

Subsequently to this the plaintiff discovered, as she alleged, that her income from the Kerrison estates did not amount to 8000*l.* a year, and that she had executed the deed-poll of March 4, 1890, under a misapprehension.

Andrew Montagu died on October 8, 1895, and the defendant G. D. Faber was his sole executor and residuary legatee.

The other defendants were some subsequent mortgagees of Lord Bateman and Lord Bateman himself.

The plaintiff claimed a declaration that she had not at any time since the execution of the deed of June 26, 1867, succeeded to an income in her own right of 8000*l.* or more per annum for her separate use within the meaning of the proviso; and also a declaration that the admission by the plaintiff in the deed-poll of March 4, 1890, was not binding upon her in respect of the income to which, under the deed of 1867, she became entitled for her separate use without power of anticipation, and that, notwithstanding the deed-poll, she had always been and still was entitled to that income.

Before Kekewich J. the question of law was first argued, whether the plaintiff was bound by her admission contained in the deed-poll. Kekewich J. held that by reason of the restraint on anticipation imposed by the deed of June 26, 1867, the plaintiff was not bound by her admission. The defendant Faber appealed.

Renshaw, Q.C., and *Brabant (Sir E. Clarke, Q.C., with them)*, for the appellant. It is submitted that the plaintiff is bound by her admission, contained in the deed-poll of March 4, 1890, that she has succeeded as tenant for life to the Kerrison estates, and is now in the receipt of an income of 8000*l.* or more per annum. She is estopped by this admission, by which she induced Montagu to alter his position to his disadvantage, from now denying the truth of that which she admitted. Her life estate under the deed of June 26, 1867, was no doubt subject to a restraint on anticipation, but it was also subject to the proviso for cesser if she should succeed to an income of 8000*l.* a year. It is the operation of this proviso, not her own act, which deprives her of her interest, and this distinguishes the present case from *Jackson v. Hobhouse*. (1) It is a question of fact whether she has succeeded to an income of 8000*l.* a year, and this fact may be proved by her own admission. Her admission by answer or by her counsel in court would bind her. A married woman may be bound as to her separate estate by estoppel just as a feme sole: *Sharpe v. Foy* (2); *Jones v. Frost* (3); though in those cases there was no restraint on anticipation.

[LINDLEY M.R. referred to *White v. Greenish*. (4)]

“Estoppel is only a rule of evidence”: *Low v. Bouverie* (5), per Bowen L.J. The restraint on anticipation is annexed to the life estate, and when that estate ceases it is gone. The restraint is a creature of equity, and a Court of Equity will not allow it to operate against estoppel, which is a rule of equity as well as of law. A married woman cannot shelter herself under her own fraud. *Stanley v. Stanley* (6) is relied on as shewing that she can; but in *Cahill v. Cahill* (7) Lord Blackburn (8) evidently disapproved the decision in *Stanley v. Stanley*. (6)

[LINDLEY M.R. referred to *Willoughby v. Middleton*. (9)]

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| (1) (1817) 2 Mer. 483. | (5) [1891] 3 Ch. 82, 105. |
| (2) (1868) L. R. 4 Ch. 35. | (6) (1878) 7 Ch. D. 589. |
| (3) (1872) L. R. 7 Ch. 773. | (7) (1883) 8 App. Cas. 420. |
| (4) (1861) 11 C. B. (N.S.) 209. | (8) 8 App. Cas. 437. |
| (9) (1862) 2 J. & H. 344. | |

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C. A. CHITTY L.J. referred to *Codrington v. Lindsay*. (1)]

1897 [The following cases were also referred to: *Derbshire v. Home* (2); *In re Vardon's Trusts*. (3)]

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Warrington, Q.C., and *Beaumont*, for the plaintiff, were not called upon.

LINDLEY M.R. This case is somewhat new in its details, and it is of great importance, both to lawyers and socially. But, in my opinion, it is impossible for us to reverse the decision of Kekewich J. unless we are prepared to say that it is competent for a married woman, who is entitled to property for her separate use without power of anticipation, to get rid of the restraint by telling an untruth, and procuring some third person to act on the faith of that untruth. I do not say that the law would be unreasonable if that proposition were well founded, but I dare not say it is law in the face of some well known authorities which say that it is not.

The question arises in this way. The plaintiff, Lady Bateman, was entitled to property, which I will call the Kelmarsh estates, for her life, for her separate use without power of anticipation. The settlement which created that interest contained a proviso, that, if at any time she should succeed to an income in her own right of 8000*l.* or more per annum for her separate use, then the previous trust for her benefit should cease. Now, whether this trust has or has not ceased or determined depends upon this simple question of fact: Has she or has she not succeeded to an income in her own right of 8000*l.* a year? If she has, then the Kelmarsh estates have ceased to belong to her for her life; if she has not, then those estates still continue to be hers. I entirely agree with Mr. Renshaw that this is a mere question of fact.

What is the evidence before us? The evidence is, a deed-poll executed by the plaintiff in which she states that she has succeeded to an income in her own right of 8000*l.* a year. The first question which arises is, whether that deed is admissible in evidence against her. I think it plainly is. There is no

(1) (1872) L. R. 8 Ch. 578, 590.

(2) (1853) 3 D. M. & G. 80.

(3) (1885) 31 Ch. D. 275.

objection to it, and it amounts to an admission by her that this event has happened. But she says, "I made a mistake. I made that admission by inadvertence, and I now claim relief upon the ground of that mistake." The answer of the defendant Faber to that is, "You are not entitled to say your admission was made under a mistake or was untrue, because you made it with a view to induce—and you did induce—Mr. Montagu to act upon it, and to change his position by reason of it. I do not care whether your statement was true or untrue. You said you had succeeded to an income of 8000*l.* a year, in order to induce him to make arrangements with your husband which he would not otherwise have made, and he made them, and therefore you are estopped from denying the truth of your statement."

Now, no doubt, as regards any one but a married woman who is entitled to property for her separate use without power of anticipation, that would be a good answer. But, if we admit it to be a good answer to this plaintiff, what are we doing but enabling her by telling an untruth to deprive herself of that protection which the restraint on anticipation was designed to afford to her? In my opinion, that cannot be done. I entirely agree with the learned judge below. I do not think it necessary to go through the cases: none of them exactly touches the present case. It is new in point of detail, but in principle it is old. A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go that length)—deprive herself of the protection which the restraint on anticipation throws around her. About the policy of the law I will say nothing, but it has been sanctioned by the Married Women's Property Act.

The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole. The appeal must be dismissed with costs.

CHITTY L.J. I agree. If the plaintiff had been a man, instead of a married woman restrained from anticipation, there would have been a clear estoppel. The circumstance that the admission was made by a deed is not material on the question of

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law. The deed only shews that the statement made by Lady Bateman was a solemn and deliberate statement; the result would be just the same if it had been made by a letter instead of by a deliberate deed of arrangement.

The question is, whether the law of estoppel, which applies to a man and equally to a married woman who holds her property for her separate use, there being no restraint upon anticipation, ought to be applied against a married woman who is restrained from anticipation so as to deprive her of an estate which is subject to that restraint.

No authority has been cited, nor, so far as I am aware, can be cited, in favour of that proposition. It was well put in argument that the law of estoppel is only part of the law of evidence. But we must look at its effect, having regard to the way in which a married woman is treated in courts of equity, and to the sanction which has been given by the Legislature to that treatment in the Conveyancing Act.

The Courts of Equity which created the doctrine of separate use made a married woman for the purpose of her separate property a feme sole; but then they superadded the restraint on anticipation, and that restraint cannot be got rid of by the Court, even when it would be for the married woman's benefit to do so, without the aid of statute, as is shewn by the well-known case of *Robinson v. Wheelwright*. (1) The only way in which the restraint can be got rid of is under s. 39 of the Conveyancing Act, 1881, by an application to the Court, which, if it is satisfied that it is for the benefit of a married woman, can relieve her from the restraint. The result, as has been already pointed out by the Master of the Rolls, of our allowing this appeal would be to give the married woman—indirectly, but substantially—the control over the property which is thus settled. It appears to me that we should be misapplying the doctrine of estoppel if we allowed it to have such an effect against the plaintiff.

It was said that, if at the trial of an action she had admitted in court that she had succeeded to an income of 8000*l.* a year, if the question had been raised and the Court had accepted

(1) (1855) 21 Beav. 214.

her admission as being sufficient proof of the fact, and there had been a judgment accordingly, the matter would have stood differently, and she would have been bound by the admission. But it appears to me that she must even then be allowed to retract her admission when it is attempted to make use of it to enable her by her own act to get rid of the restraint on anticipation.

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No question of fraud arises here, and therefore we need not consider the authorities relating to fraud. But, as the law now stands, it seems to me that the better opinion is that a married woman's deliberate fraud will not enable her to get rid of the restraint on anticipation.

VAUGHAN WILLIAMS L.J. I, too, am sorry that the law is such that a married woman cannot relieve herself of this fetter in cases in which she has been guilty of a fraud, because the restraint on anticipation is a fetter imposed mainly for her benefit, and it does not seem very wholesome that she should continue to have the benefit of the fetter when she has chosen by a deliberate fraud to lead another person to alter his position for the worse, upon the assumption that no such restraint exists. But I do not think it has been argued here to-day that a married woman can relieve herself of the restraint on anticipation by her fraud, and it seems to me that since *Stanley v. Stanley* (1), it would be impossible to maintain such a proposition. Under those circumstances, it seems to follow that the judgment now appealed against was right.

It is sought to distinguish this case from *Stanley v. Stanley* (1) by saying that the defendant does not rely upon any dealing by the married woman with her property, but that he only relies upon a rule of evidence; and that, although a married woman cannot directly affect the restraint upon anticipation by her act—even by her fraudulent act—yet it does not follow that she is not liable to the same laws of evidence as other people, and that if that be so she is bound by this estoppel; and the moment this deed-poll is put in it proves (unless it can be contradicted) that the event has happened on the happening

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of which she was to lose her life estate, and she is thenceforth estopped from offering evidence to the contrary. It is said that she is bound by this rule of evidence, and that there is nothing in the decision in *Stanley v. Stanley* (1), or the other decisions to the same effect, relieving her from the operation of that rule. I think that proposition is based upon a misunderstanding of the real nature of the rule. It is quite true that the deed as executed by the plaintiff contains her admission, and as such is evidence against her. But it is not sought to rely only on this admission: it is said that it is an admission which she ought not to be allowed to contradict, because she cannot do so without wronging those who have acted upon the faith of her representation. If that is the principle upon which she is to be prevented from contradicting her admission, one cannot help seeing that the rule of evidence is based upon this—that the Court will not allow any one to commit such a wrong in its presence and during its hearing of a case. It seems to me that, when that is recognised, the ground upon which a married woman is prevented from contradicting her admission is brought within *Stanley v. Stanley* (1) and similar cases.

I think, therefore, that, as has been already said by my learned brethren, it is impossible to differ from the decision of Kekewich J. without really holding that a married woman may by her own act relieve herself from a restraint on anticipation, and I agree with the decision of the other members of the Court.

Solicitors: *Greenfield & Cracknall; Hudson, Matthews & Co.*

(1) 7 Ch. D. 589.

W. L. C.

In re ROWE.
PIKE *v.* HAMLYN.

[1897 R. 565.]

C. A.

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Nov. 30;
Dec. 2.

*Will—Construction—Debt—Legacy—Erroneous Statement of Indebtedness—
Intention to confer Bounty—Falsa Demonstratio.*

A testatrix bequeathed to her grandniece "the sum of 300*l.* in addition to the sums owing to her from my late husband's estate." The will contained no direction to pay debts. There were no sums legally owing to the grandniece from the husband's estate, but there were two sums of 500*l.* for which the husband (as the testatrix knew) had given her an I O U and promissory note, which, however, were not enforceable for want of consideration. The testatrix was universal devisee and legatee under her husband's will:—

Held, having regard to the surrounding circumstances, that the intention of the testatrix was to include the two sums in question in the bequest.

Per Vaughan Williams L.J.: An erroneous recital in a will of indebtedness on the part of a testator to a legatee, even though accompanied by a direction to pay, will not amount to a gift of the supposed debt, in the absence of any indication in the will of an intention of bounty in respect thereof; but such intention may be implied from the general scope of the will.

Adams v. Adams, (1842) 1 Hare, 537, *Whitfield v. Clemment*, (1816) 1 Mer. 402, and *Wilson v. Morley*, (1877) 5 Ch. D. 776, discussed.

THIS was an appeal from a decision of Romer J.

Miss Margaret Ann Hooper Hamlyn, the defendant in the action, was a grandniece of Mrs. Mary Ann Rowe, the testatrix in the action, and resided with Mrs. Rowe and her husband for nine years prior to the death of the latter in 1895, and she was treated as one of the family, Mr. and Mrs. Rowe not having any children of their own. Both Mr. and Mrs. Rowe were old and infirm, and Miss Hamlyn attended to them, and received from Mr. Rowe a yearly salary of 8*l.* for her services. Mr. Rowe also made certain presents to her in his lifetime.

On February 15, 1894, he gave her an I O U for 500*l.* On July 2, 1894, he gave her a promissory note for 500*l.*, and in February, 1895, he gave her a deposit note for 500*l.* Miss Hamlyn was unable to obtain the money for the deposit note

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owing to its not being properly indorsed; but on March 4, 1895, Mr. Rowe re-indorsed it, and she duly received the 500*l*.

On March 7, 1895, Mr. Rowe died, having by his will, dated December 18, 1855, devised and bequeathed all his real and personal property to his wife and appointed her sole executrix. At the date of his death Mr. Rowe had besides certain real estate, personal estate to the extent of about 3000*l*.

On April 1, 1895, Mrs. Rowe proved the will of her late husband, and on the same day she made her own will. After appointing Miss Hamlyn and another person executors of her will and devising certain real estate to her brother and bequeathing certain pecuniary legacies, the testatrix made the following bequest: "I bequeath to the said Margaret Ann Hooper Hamlyn the sum of 300*l*. in addition to the sums owing to her from my late husband's estate." Then followed some further pecuniary legacies, and the testatrix directed that all the before-mentioned legacies should be paid free of legacy or other duty. The will contained no direction to pay debts and no residuary gift. The testatrix died on April 11, 1895, and her will was proved on June 10, 1895, by Miss Hamlyn alone.

The estate of the testatrix consisted almost entirely of the property derived from the will of her late husband. At the time of making her will and of her death the testatrix was aware that the I O U and the promissory note above mentioned were held by Miss Hamlyn, and that they had not been paid; and it was not suggested that the sums spoken of by the testatrix as owing to Miss Hamlyn from her late husband's estate could refer to anything but the sums secured by these instruments. On April 7, 1897, an originating summons was taken out by George Pike, who was one of the next of kin of the testatrix and would be entitled to one-twelfth of her estate on an intestacy, against Miss Hamlyn for the administration of the estate of the testatrix; but the only substantial question at issue was whether the bequest to Miss Hamlyn included the two sums in question, having regard to the fact that the I O U and the promissory note were not legally enforceable by reason of their having been given without consideration.

Romer J. regretted that he was unable to allow these two

sums of 500*l*. Although he thought it probable that if the testatrix had known that these two sums were not enforceable against her late husband's estate she would have given a further legacy to Miss Hamlyn, he could not find in the will any bequest or legacy of these two sums; it merely amounted to this, that the testatrix, being under an erroneous impression that these were binding debts on her late husband's estate, gave her a less legacy than she otherwise would have done. He therefore held that Miss Hamlyn's claim to these two sums failed.

Miss Hamlyn appealed.

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Neville, Q.C., and *Jenkins Q.C.*, for the appellant. 1. Even if there is not enough on the face of the will to constitute an implied gift of the two sums of 500*l*., the testatrix treated these two sums as debts which she was bound to pay, and the respondent, having accepted a legacy under the will, is bound to recognise that view: *In re Aird's Estate*. (1)

2. There is an implied gift of these two sums.

At the time of making her will the testatrix knew that the I O U and promissory note had been given to the defendant by her late husband and were still held by her; she was absolute mistress of his estate, and it rested with her whether these sums were to be paid or not. Having regard to these circumstances, the will contains a sufficient indication of an intention on the part of the testatrix to pay these sums as well as the 300*l*., whether they were legally owing or not. The 300*l*. is to be in addition to these two sums. Indeed, it is difficult to explain the reference to these sums in a clause dealing with legacies unless it was intended to make provision for their payment; and if that intention is established, the fact that they are erroneously described is immaterial.

This principle is illustrated by *Farrer v. St. Catharine's College, Cambridge* (2); *Hall v. Lietch*. (3)

Farwell, Q.C., and *Stewart-Smith*, for the respondent. Where a testator erroneously recites in his will that a person is

(1) (1879) 12 Ch. D. 291.

(2) (1873) L. R. 16 Eq. 19.

(3) (1870) L. R. 9 Eq. 376.

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entitled by a paramount title, that excludes the idea of bounty ; although, if he erroneously recites that he has given a legacy, that amounts to a gift by implication : *Adams v. Adams*. (1) *Farrer v. St. Catharine's College, Cambridge* (2), falls within the second branch of this proposition, and is, therefore, distinguishable from the present case ; but in *Hall v. Lietch* (3), as pointed out by the present editors of *Jarman on Wills*, 5th ed. vol. i. p. 493, the distinction drawn in *Adams v. Adams* (1) appears to have been overlooked by Malins V.-C., and the decision of the Vice-Chancellor cannot be treated as a binding authority. The testatrix believed these sums to be debts, and to that extent she intended them to be paid ; but the will contains nothing to shew that she intended them to be paid in any event. The direction that the legacies, without any mention of these two sums, were to be free of duty is opposed to the view that the testatrix intended to include them as legacies.

In re Aird's Estate (4) is not in point. Here the plaintiff is claiming as next of kin, and it would be an unwarrantable extension of the doctrine of estoppel to debar him from setting up his title as next of kin because he has accepted a legacy under the will.

The deposit note of 500*l.* operates as satisfaction of one of the two sums secured by the I O U and promissory note.

E. U. Bullen watched the case on behalf of the other next of kin.

Jenkins, Q.C., in reply.

Cur. adv. vult.

Dec. 2. LINDLEY M.R. This is an appeal from a decision of Romer J., and the question turns entirely upon the construction of a very short passage in a very short will, and of course upon the application of the language there used to the circumstances with which we have to deal. [His Lordship stated the facts substantially as set out in the statement, and continued :—]

The important point to bear in mind in reading this will is

(1) 1 Hare, 537.

(2) L. R. 16 Eq. 19.

(3) L. R. 9 Eq. 376.

(4) 12 Ch. D. 291.

that Mrs. Rowe had the whole of the assets of her husband, and that she was the person to pay his debts. Of course the promissory note and the I O U being given without consideration were not legally enforceable. Whether she knew the law about that I do not know. [His Lordship then referred to the will, and called attention to the absence of any direction to pay debts therein, and he continued as follows:—]

The question arises, what is the true construction, first, and the effect afterwards, of this short bequest: "I bequeath to Margaret Hamlyn the sum of 300*l.* in addition to the sums owing to her from my late husband's estate"? Romer J. said in his judgment: "I cannot see, in this will, that there is any bequest or legacy of these two sums" (that is, the two sums of 500*l.*), "nor do I find that it amounts to more than this: 'I, the testatrix, being under the erroneous impression that these are binding debts on my testator's estate, give her a less legacy than I otherwise would.' I cannot remedy that." With great deference to the learned judge, I cannot adopt that view. It appears to me that we can find here language which amounts to a clear legacy of the sum of 300*l.* and of these two sums of 500*l.* when the facts are known. It is a legacy in the form of a legacy of A plus B; or of A in addition to B. Now, if a testator makes a legacy in that form, and is in a position to pay B as well as A, it appears to me that that is a legacy of A and B; and of B as much as A. Of course, if the testator is not in a position to pay B, then the legacy cannot be extended beyond A. In this case, if this testatrix had not been the paymaster—if she had not succeeded to her husband's assets and was not in a position to make this legacy of these two sums, the legacy would be a legacy of 300*l.*, and of course you could not read it as a legacy of anything more; but, being the person to pay, having the whole thing in her own hands, when she says, "I give my great-niece 300*l.* in addition to the sums owing to her from my late husband's estate," to my mind it is perfectly plain that she intended that her great-niece should have out of her estate which she had obtained from her husband, and which she called his estate, those two sums plus the 300*l.* It was a gift of the 300*l.* plus what she erroneously described as

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“ the sums owing to her from my late husband’s estate.” That is a mere *falsa demonstratio*. It is perfectly plain she intended to regard those things as debts. She so describes them. She treats them as debts, but she says they are to be paid out of her estate. That is the legal effect of this clause when you come to look at it, and bear in mind what is the key to the whole position—namely, that she is the person to pay.

[His Lordship then dealt with the contention that the deposit note was a satisfaction of either the I O U or the promissory note, and came to the conclusion that this contention was not well founded, having regard to the fact that Mr. Rowe, in giving the deposit note to Miss Hamlyn, had not demanded back either of the other securities. He therefore held that Romer J.’s judgment ought to be reversed and the appeal allowed.]

CHITTY L.J. I agree. The more important facts constituting surrounding circumstances which may legitimately be given in evidence are these. The testatrix knew that her grandniece Margaret held the promissory note and I O U of her deceased husband. The grandniece had been living with her and her husband for nine years, and was receiving a pittance of 8*l.* a year for her services in taking care of the old couple. The inference, I think, is irresistible that she was aware that the promissory note and the I O U were not given for any valuable consideration; in other words, that her niece had no money in her possession, and could not have given valuable consideration for the two documents. Mrs. Rowe’s husband had died on March 7, 1895, having made his wife by his will universal devisee and legatee. She proved that will on April 1, the same day as that on which she made her own will, and she knew that his personal estate was about 3000*l.*, which was her own. She had no other property except that which she took under the will. She knew that her grandniece had no other demand against her husband’s estate except upon the promissory note and the I O U. It was in these circumstances that she made her will, and she died some ten days after she had made it. There is no direction to pay debts; she appoints

Margaret, her grandniece, and another person who has not proved, her executors. The will contains a devise of part of the property that she had derived from her husband; and then there follow pecuniary legacies amounting to the sum of 770*l.*, exclusive of the legacy of 300*l.* Now, I think, as the Master of the Rolls has said, that the cardinal point in this case is that she was herself the paymaster. She seems to have been under an error as to the law, as is shewn on the face of her own will when she speaks of the sums as owing by her husband's estate. The gift of the 300*l.* is "in addition to the sums owing to her," the grandniece, "from my late husband's estate," the sums obviously meaning the two sums secured by the promissory note and the I O U. Now, her intention seems to me to be apparent upon the face of this will, bearing in mind the circumstances which may be legitimately given in evidence, that the grandniece should have the 300*l.* in addition to the 1000*l.*, which is referred to under the words "the sums owing to her from my late husband's estate." Her intention was that the 1000*l.* should be paid out of her husband's estate, which was her own. This is not the case of an attempt to set up a gift by an erroneous recital of an independent title—there is no such recital. There is the statement, but it is a statement in the gift, and the statement is that the 300*l.* is given in addition to the sums mentioned. Now, a gift of a legacy by a codicil, in addition to a legacy stated as given by the testator in his will, is a gift of the legacy spoken of as additional where the testator has, in fact, not made any such gift by his will. This is not exactly that case; but it is, in my opinion, analogous to it. There was no reason for mentioning the two sums as owing for the purpose of shewing that the 300*l.* was not in satisfaction of any debt within the rule, the propriety of which has been much canvassed in *Talbot v. Duke of Shrewsbury* (1) and *Chancey's Case* (2), because the rule applies only where the legacy is of a sum of money as great or greater than the debt. I revert to the words, and my opinion is that the words themselves are sufficient to shew the intention of bounty in regard

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(1) (1714) Pr. Ch. 394; 2 W. & T.
(7th ed.) 375.

(2) (1717, 1725) 1 P. Wms. 408;
2 W. & T. (7th ed.) 376.

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to the sums stated to be owing from her late husband's estate, which estate was her own, and which she knew was her own at the time she made this will. I therefore hold that the two sums are legacies given by her under the will.

VAUGHAN WILLIAMS L.J. I entirely agree, and I should add nothing if it were not, first, that we are differing from the conclusion of Romer J.; and, secondly, that this is a case of the construction of a will which in a sense raises a question of frequent occurrence, and I think it is very desirable that one should state clearly the grounds upon which one finds the bequest or legacy in a will in which there are no express words of legacy or bequest. Therefore, I will state what my view of this matter is.

In the present case the question is whether, by express words or by implication from the whole will, you find an intention by the testatrix to bequeath as a legacy the sums spoken of as owing by her late husband to Margaret Hamlyn; and, assuming that you find that intention, a second question arises as to whether the fact that no sums were due—that is, legally due—from the husband of the testatrix to Margaret Hamlyn will prevent the legacy from taking effect. Now, as to the first question, if there are in the will no words amounting to a gift, or such a direction to pay, as indicates an intention to confer the bounty of the testatrix, but merely words of erroneous recital or recognition of indebtedness, no intention of giving a legacy will be disclosed by the will. I do not understand the case of *Adams v. Adams* (1), which was so much relied upon, to go beyond that proposition. The mere recital that some one named in the will as a legatee in respect of another legacy has an interest independent of the will in an estate or fund under the control of a testator will not be a sufficient indication of an intention to make a gift by will of that interest, even though such recital may be accompanied by a direction to pay; and, if that is a true proposition, it is a fortiori a true proposition where the interest recited is an interest of a creditor to whom the estate is indebted. To infer the intention to confer a

bounty, you must, in my judgment, find in the will, in addition to the direction to pay, evidence of the intention to confer a bounty. Now, in *Whitfield v. Clemment* (1), a direction to pay an overstated debt on a bond was held by Sir William Grant to sufficiently indicate an intention to give a legacy of that amount by reason of the implication arising from the general scope of the will. On the other hand, in *Wilson v. Morley* (2), Fry J. failed to find sufficient in the will to disclose an intention to make the recited debt the subject of the testator's bounty. I mention those two cases as being on either side of the line, because in the judgments the reasons which will induce a Court to find, or to refuse to find, the intention to confer a bounty seem to me very clearly and forcibly set out. Now in the present case you have no express direction to pay, unless you read the words "in addition" as referring to the word "bequeath." This seems, for reasons which have already been expressed by other members of the Court, and in which I entirely agree, to be a possible, though not a necessary, construction of this will; and, that being so, I think that one ought to look at the whole will to find the answer to the question whether one ought to adopt this possible construction. I think that one ought to adopt this construction, and for two or three short reasons which I am going to give. In the first place, it really seems difficult, if not impossible, in the present case to suggest any reason for mentioning the indebtedness of the estate of this lady's husband, unless the purpose was to include these sums in a bequest by the present testatrix. Secondly, the mention of these sums is part and parcel of a clause introduced into the will for the purpose of giving a legacy to Margaret Hamlyn. It will be found that this is one of the reasons which is relied upon by Sir William Grant in *Whitfield v. Clemment*. (1) Lastly, the whole will deals only with legacies by the testatrix, and does not deal with debts at all, and contains no reference to the obligations of the testatrix as personal representative of her husband. These are the reasons which induce me to adopt this, which is a possible construction of this will.

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(1) 1 Mer. 402.

(2) 5 Ch. D. 776.

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Now, I have only to add to what I have been saying that, of course, if you once find the intention to give a legacy, the *falsa demonstratio* causes no difficulty whatever, provided you are assured of the identity of the subject-matter, the legacy; and, in my judgment, in the present case there can be no doubt as to the identity of the subject-matter, it being perfectly clear that the testatrix was referring, by these words "sums owing by my late husband to Margaret Hamlyn," to the sums mentioned in the unenforceable promissory note and I O U.

Solicitors: *Taylor, Hoare & Pilcher, for J. & S. P. Pope, Exeter; Mear & Fowler, for Dunn & Baker, Exeter; E. & J. Mote, for Carter & Carter, Torquay.*

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[1894 S. 1752.]

Executor—Action by Residuary Legatee—Wilful Default—Breach of Duty—Omission to enable Secured Creditor to realize his Security—Loss of Interest.

The executors appointed by a testator did not prove the will until nearly seven years after his death. Part of the testator's estate consisted of moneys payable under a policy of insurance on the life of the testator, which he had equitably mortgaged to his bankers as security for a larger amount. The insurance society would not pay over the moneys without production of the probate, and for nearly seven years the executors paid the bankers or their transferee out of the estate interest at 5 per cent. on their debt.

After production of the probate the insurance company paid over the policy moneys to the bankers' transferee, together with interest at 1 per cent. per annum from the time when such moneys became payable; and the difference between the interest thus received and paid was 157*l.* 14*s.* 8*d.*

The executors never had sufficient assets in their hands to pay all the testator's debts; and it was

Held, that the executors could not be ordered to account on the footing of wilful default or breach of duty by reason of this loss of interest to the estate.

Per Chitty L.J.: On taking the common accounts of their receipts,

executors can properly be, and often are, charged with a devastavit arising on the accounts themselves.

Per Vaughan Williams L.J.: No action would lie for neglect to take out probate, and the plaintiff's only remedy would be by citing the executor in the Probate Division.

The decision of North J., [1897] 1 Ch. 422, affirmed.

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THIS was an appeal from the decision of North J. (1), and the following short statement of the facts of the case together with the references thereto, in the judgments delivered by their Lordships, will be sufficient for the purposes of this report.

The action was brought on April 30, 1894, by the plaintiff Alice Mary Cooke, as one of the residuary legatees of the testator Stevens, in order to have his real and personal estate administered by the Court, and to have accounts taken against the defendants upon the footing of wilful default.

The testator died on December 28, 1882, having by his will, which was dated in February, 1880, appointed three executors, C. J. Stevens, John Sewell, and M. S. Emerson. The will was never proved until October 15, 1889, when probate of it was granted to C. J. Stevens alone. Emerson did not renounce probate or disclaim the trusts of the will until May 29, 1894, after the statement of claim in this action had been delivered. But according to the view of the evidence taken by North J., Emerson had done certain acts in the character of executor as early as 1883 which amounted to acceptance by him of the office of executor. Sewell never renounced or disclaimed, and never acted as executor except by signing one letter. The plaintiff brought his action against C. J. Stevens and M. S. Emerson only, without making Sewell a defendant, and the defendants did not suggest that Sewell ought to be joined.

The plaintiff alleged several acts of devastavit, and of wilful default on the part of the defendants, of which two only need be mentioned in this report. The first was that they omitted to get in a debt alleged to have been due to the testator at the time of his death from one Clarke. As to this it was held by North J., and also (as will be seen) by the Court of Appeal, that the plaintiff had failed to establish as against the

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defendants the existence of any such debt. The facts as to the second alleged act of wilful default were shortly as follows. The testator's estate consisted in part of a sum of 676*l.*, payable under a policy of assurance upon his life, which policy he had deposited, together with other documents of value, with his bankers, Messrs. Gurney, as a security. There was a memorandum of the deposit, but no assignment of the policy moneys. These documents were in the possession of Messrs. Gurney at the time of his death, and a sum of over 1700*l.* was due to them on those securities. The insurance company declined to pay the policy moneys without the production of the probate of the will, and these moneys were not in fact paid until shortly after the production of the probate, when the 676*l.* was with the assistance of C. J. Stevens paid by the insurance society to a transferee from Messrs. Gurney together with interest thereon at the rate of 1 per cent. per annum from March 21, 1883 (when the moneys became payable) to November 21, 1889. Meanwhile the executors had continued to pay interest at the rate of 5 per cent. per annum upon the mortgage debt which was secured by the policy. The difference between the interest thus received and paid amounted to 157*l.* 14*s.* 8*d.*, and the plaintiff sought to charge the defendants with this sum upon the ground that it had been lost to the estate by reason of their wilful default or neglect. It appeared that the assets got in by the executors were not sufficient to pay the debts of the testator.

It was held by North J. that the defendants could not be ordered to account upon the footing of wilful default by reason of this loss of interest, and his Lordship dismissed the action so far as it sought relief on that footing, directing the ordinary accounts only to be taken against the defendants.

The plaintiff appealed against this part of his Lordship's decision, and by his notice of appeal asked that in lieu thereof it might be ordered that the accounts should be taken against the defendants on the footing of wilful default, or, in the alternative, for a declaration that they ought to make good to the testator's estate the loss caused by reason of their wilful default and neglect and breach of duty in not getting in the policy for

676*l.*, and not taking the necessary steps for so doing, and that an inquiry might be directed as to the amount of such loss with ancillary relief.

Butcher, Q.C., and *Methold*, for the appellants. In this case there was a delay of nearly seven years by the executors in obtaining probate of the will. No excuse or explanation of any kind is offered for this delay, and the executors are liable to make good to the testator's estate any loss which it was within their duty and their power to prevent. They were guilty of wilful neglect and default, or, at all events, of breach of duty, in omitting to get in the debt due to the testator at the time of his death from Clarke, and also in neglecting or omitting to take the proper steps to enable Messrs. Gurney to receive the policy moneys from the insurance company, and so to realize their security. The learned judge seems to have considered that although there was some breach of duty it was too remote to render the executors liable to account as for wilful default; but we contend that this loss of 157*l.* 14*s.* 8*d.* was entirely caused by, and was the direct consequence of, their delay. These policy moneys were a part of the testator's outstanding estate, of the existence of which the executors were fully aware. They knew it was their duty to get it in, and they knew it formed a portion of a security which was carrying a high rate of interest. They did not get it in for seven years, and all the time went on paying the high rate of interest, and they are liable to the estate for the loss caused by their breach of duty: *In re Brogden* (1); *Seaman v. Dee* (2); *Hall v. Hallet* (3); *Lowry v. Fulton*. (4) There ought to be either a declaration of liability, or at all events an inquiry as to whether any and what loss has been occasioned to the estate by any breach of duty on the part of the executors.

[LINDLEY M.R. referred to *Stiles v. Guy*. (5)]

Swinfen Eady, Q.C., and *Christopher James*, for the respondents. With regard to Clarke, up to the present moment

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(1) (1888) 38 Ch. D. 546.

(3) (1734) 1 Cox, 134.

(2) (1672) 2 Lev. 40.

(4) (1839) 9 Sim. 115.

(5) (1848) 16 Sim. 230.

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there is no proof of any debt being due from Clarke to the testator at the time of his death. As to the mortgage debt to Messrs. Gurney, the estate of the testator was an insolvent one. The policy moneys were mortgaged to Messrs. Gurney for much more than their value; and if the executors had proved the will, these policy moneys must have been paid, not to the executors, but to Messrs. Gurney in part discharge of their debt. Wilful default could only be decreed against these executors in respect of something which they either had, or could have received, but for their wilful default or neglect; and no such case is established here—neither has it been shewn that the plaintiff has suffered any loss or damage through any act or omission of theirs.

The liability of an executor is not so extensive as is contended. He is entitled to pay one creditor in preference to another at any time before an administration decree has been made; and as against a legatee, it is not devastavit if he pays a simple contract debt not carrying interest in priority to a specialty debt carrying interest, although a loss to the estate may result: *Turner v. Turner*. (1) This action cannot succeed except upon breach of duty, and no breach of duty, wilful default, or devastavit can be made out. Moreover, the plaintiff can only go back six years. The executors are entitled to the benefit of the Statutes of Limitations; and if no other statute applies, then to the benefit of the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (b).

Butcher, Q.C., in reply. The onus is on the executors to shew that they had not assets to pay the mortgage debt; and they have not discharged themselves of that burden. If they had assets, they could themselves have got in the insurance money; but if they had not, still they were guilty of wilful default in not enabling the mortgagees to receive it so as to reduce their debt. Wilful default is a breach of duty in omitting to do something which it is the executor's duty to do. *Clough v. Bond* (2) goes nearest to defining the duty of an executor. It lays down that he must use due diligence, and that if he does not he is personally liable for the consequences,

(1) (1819) 1 Jac. & W. 39.

(2) (1838) 3 My. & Cr. 490, 496.

and authorities to the same effect are cited in Bacon's Abridgment, "Wilful Default." Suppose that, owing to this delay in obtaining probate, the sum insured had been lost, would not the executors have been liable?

[LINDLEY M.R. If the policy had been unincumbered, it would have been the clear duty of the executors to get in the sum assured. The difficulty is that here the executors could not entitle themselves to receive the money.]

Due diligence generally relates to an executor's getting assets into his own hands; but is there any difference in principle between that case and the case of getting them into the hands of a mortgagee, which is equally advantageous to the estate? Mr. Swinfen Eady argues that there was no loss, because the money when paid by the company might with the consent of the mortgagees have been applied in payment of a debt not bearing interest; but that is very far-fetched.

[CHITTY L.J. Have you any authority for charging an executor with interest for leaving a debt not bearing interest outstanding for an unreasonable length of time, on the ground that if he had got it in it would have produced interest?]

I do not know any authority in point; but he ought on principle to be charged for losing interest by leaving assets outstanding which in his hands would have produced it. No Statute of Limitations can be set up by the executors except the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (b).

It is no answer to the plaintiff's claim to say that the beneficiaries might have taken some step to compel the executors to do their duty. There is no such duty cast upon the next of kin. The same point might have been taken in *Burdick v. Garrick*. (1) The Statute of Limitations does not begin to run until probate is granted or administration taken out; and a residuary legatee could not sue for a devastavit until a legal personal representative has been duly constituted. Moreover, the Statutes of Limitations are not available to the executors in this case, for they cannot set up their own wrong by way of devastavit as a defence in order to claim the benefit of those statutes: *In re Marsden* (2); Williams on Executors, 9th ed.

(1) (1870) L. R. 5 Ch. 233, 241.

(2) (1884) 26 Ch. D. 783.

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p. 1897; nor is the Trustee Act, 1888, s. 8, sub-s. 1 (b), any protection to them whatever.

Cur. adv. vult.

Dec. 9. LINDLEY M.R. In this case a residuary legatee has brought an action against his testator's executors seeking not only the ordinary accounts of their receipts and payments, but also an account against them on the footing of wilful default. So far as the plaintiff seeks to charge them with wilful default, the action has been dismissed with costs; and from this decision the plaintiff has appealed. The testator's assets got in by the executors are said not to be sufficient to pay his debts. Hence the importance of the case to the plaintiff.

Two acts of wilful default are relied upon and have to be considered. The first is that the executors omitted to get in a debt alleged to have been due to the testator at his death from a person named Clarke. The facts as to this are complicated, and the pleadings are somewhat embarrassing. But, having regard to the mode in which this part of the case was dealt with in the Court below, it would be unjust to the defendants to treat the pleadings as admitting that there was such a debt; and so far as evidence goes no such debt was proved either before North J. or before us.

The next act of wilful default charged was the omission on the part of the executors to enable a secured creditor of the testator to realize his security sooner than he did. The consequence of this omission was that the testator's estate has been diminished by the amount of interest which would have been saved if the security had been realized sooner. The security was a policy for 676*l.* on the testator's life; he had deposited it with other documents of value with his bankers, and at his death there was due to them on those securities 1700*l.* odd.

The policy was pledged for much more than it was worth. If the executors had in their hands assets sufficient to pay the debts of the deceased, including the debt due to the bankers, the executors ought to have paid the bankers off; and if,

instead of doing this, they kept assets in their hands and allowed interest to run up against the estate, and ultimately had to pay more than they would have had to pay if they had not delayed paying the bankers the amount due to them, the executors would have been guilty of a devastavit, and would be disallowed the interest thus unnecessarily paid by them.

The policy was not assigned to the bankers, and they could not give a valid receipt for the policy moneys without the concurrence of the executors. Moreover, the insurance office which had to pay the policy would not pay the bankers, even with the concurrence of the executors, until the testator's will had been proved. For some reason or other the executors did not wish to prove it, and, although eventually one of them did prove the will, the other has not proved it yet. As soon as the will was proved, the bankers, or, rather, a person to whom they had assigned their debt and the policy, obtained the policy moneys, with the assistance of the executor who had proved, and the debt was reduced by the amount received from the insurance office. It must not be overlooked that although the executors' accounts have not yet been certified, they have been fully investigated, and there is no proof even now that the executors did wrong in not paying off the bankers, and so reducing the policy and getting in the asset which it represented. In the absence, however, of such evidence, I am unable to see how a case of wilful default can be established.

If debts are paid in the wrong order to the detriment of the creditor, the executor is of course answerable. The payment would be disallowed in taking the account of the receipts and payments. But the payment of debts even in a wrong order is not a wrong entitling a legatee to relief, nor does such payment amount to wilful default; and it is wilful default which we have to consider here.

It is urged that it is the duty of an executor to prevent any loss to his testator's estate which it is in his power to prevent. But this proposition is far too wide, as is shewn (*inter alia*) by *Turner v. Turner* (1), in which it was held that an executor's right of paying one creditor before another justified him as

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against a legatee in paying even a simple contract debt not bearing interest in preference to a specialty debt bearing interest, although the estate was diminished by the additional interest which had ultimately to be borne. A wrongful payment is one thing, and can be set right by disallowing it when the executor brings in his account. But if it is sought to charge him with loss attributable to some other breach of duty, call it wilful default or by any other name, such breach of duty must be proved; and if no sufficient proof, or even *prima facie* evidence of it is given, it is not right to insert in the judgment any declaration of liability, or even an inquiry as to liability based upon such supposed breach of duty. In the present case no evidence of any such breach of duty has been given, and the attempt to charge the executors with more than they have received has failed.

Whether any payment by which the executors seek to discharge themselves ought or ought not to be disallowed must be decided hereafter. That question is not before us now. This appeal fails, and must be dismissed with costs.

I have preferred to base my judgment on the above ground rather than to investigate the question whether executors who delay proving their testator's will can be rendered liable for losses which they could have avoided if they had proved it earlier. In the present case the will has been proved by one of the defendants, and the Court, therefore, has the probate before it. The probate shews that both defendants are appointed executors by the will, and it is proved that both of them have accepted the office of executor by acting in the administration of the testator's estate. Under these circumstances I fail to see upon what principle they can derive any benefit from delaying to obtain probate. It appears to me that, having accepted office, they ought to be treated as executors as from that time, and not simply as executors *de son tort*, as their counsel contended. It is unnecessary, however, to pursue this inquiry. The appeal must be dismissed with costs.

CHITTY L.J. North J. has dismissed the action so far as it claims relief on the footing of wilful default, and has made

against both the defendants Stevens and Emerson, as executors, the common decree under which they have to account for assets received. The will was not proved until 1889, nearly seven years after the testator's death, when probate was obtained by Stevens alone. The probate shews that Emerson also was appointed executor.

North J. has held that he accepted the office by intermeddling with the assets in 1883. There is no appeal from this part of the judgment. The statement of claim raised several cases of devastavit, or of wilful default against the executors; but the appeal is confined to two.

The first is the case of Clarke, an alleged debtor, which may be disposed of in a few words. The plaintiff, who is one of several residuary legatees, failed to prove that there was any debt owing by Clarke.

Proof of the debt is the foundation of a wilful default decree. When the debt is proved the burden is thrown on the executor to shew why he did not get it in: *Stiles v. Guy* (1) and *In re Brogden*. (2) I am satisfied by the judge's notes and the statements of counsel that the only substantial contest before North J. was confined to the sum of 395*l.*, and the evidence all went to shew that the 395*l.* were not owing at the testator's death. The inference was that that sum had been paid or satisfied in the testator's lifetime.

The other case relates to the policy for 676*l.* which became payable in March, 1883. This policy was mortgaged by the testator with other securities for an amount far exceeding the sum recoverable under the policy. The mortgage, which was held by the testator's bankers, was effected by a deposit of the policy and a memorandum. As there was no assignment of the policy within the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), the bankers could not sue the insurance office: the right of action at law remained vested in the executors. But, inasmuch as the policy was equitably mortgaged for an amount in excess of its value, the executors, assuming they had proved the will, could not have sued for or recovered the policy moneys or any part of them: they were not entitled to

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(1) 16 Sim. 230.

(2) 38 Ch. D. 546.

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receive the moneys without the consent of the mortgagees, and there is no evidence or even suggestion that the mortgagees would have consented to the receipt of the moneys by the executors. The only proceedings which they could have taken against the bankers or their assignee was an action to redeem in which they might have joined the insurance office as defendants. The result appears to be this: the executors could not be charged under what is termed a wilful default decree. Under such a decree the executors are charged with what they have received or might have received but for their wilful default or neglect.

But the case does not rest here. If on the facts proved a case of devastavit by negligence is established other than what is technically termed wilful default, the Court ought to make the proper declaration against the executors.

The loss alleged is the difference between the interest allowed by the insurance office and the interest which the mortgage debt carried—a difference of 4 per cent. The charge made by the plaintiff's pleading is not merely for wilful default: it is also for a devastavit. I pause for a moment to say that, on taking the common account of their receipts, executors can properly be, and are often, charged with a devastavit arising on the accounts themselves. On taking the account they stand charged with their receipts; and if they seek to discharge themselves by unlawful payments, their discharge is disallowed. Further, if on taking the account it appears that the executors have improperly retained balances in their own hands, they are liable to be charged interest on the balances, although no such charge is raised on the pleadings. For this purpose an additional inquiry is generally directed. The charge of interest when it is made by the Court rests upon the foundation of a devastavit.

When a charge of the nature now under consideration is made by the pleadings, the general rule is that it ought to be disposed of at the trial: see *Smith v. Armitage*. (1) But the rule is not universal, and there may be and are cases where it would be proper to direct an inquiry. The plaintiff's counsel

(1) (1883) 24 Ch. D. 727.

on this appeal ask for a declaration of liability, or, in the alternative, for an inquiry.

Now, in this case there is the fact that an order for administration against Stevens alone had been made at the instance of another residuary legatee. The accounts had been taken and were ready for the chief clerk's certificate; but no certificate had been made. North J. stayed all further proceedings under that order with liberty to adopt the proceedings under it in this action. It is plain that the numerous charges in the plaintiff's pleadings in this action are in great measure founded upon a knowledge of the accounts in the former action.

The charge against the executors resolves itself into a charge that they were answerable to the plaintiff and other the residuary legatees for loss arising from their negligence in not paying off sooner than they did the interest-bearing debt secured by the mortgage. This charge does not appear to me to rest upon the question whether it was their duty to have proved the will sooner than they did. I will assume that they cannot set up their delay in proving the will as a defence, and that they stand in the same position as if they had both proved the will in 1883 when by intermeddling they accepted the office. But to make good the proposition that the executors are liable for not paying off the mortgage or, in other words, for not redeeming it, it is incumbent on the plaintiff to shew that the executors had assets which they were bound to apply in redemption of the mortgage. I say "bound to apply" advisedly, because here there comes in the right of an executor to prefer one creditor to another of the same degree at any time before a decree for administration is made by a court of equity.

Some few years ago an attempt was made to interfere with this right by appointing a receiver; but it is now established that a receiver ought not to be appointed merely for the purpose of depriving the executor of his right of preference. It suffices to refer on this point to Stirling J.'s decision in *In re Wells* (1), where the authorities are cited and dealt with. Where an executor has assets in his hands which he ought to

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apply in payment of an interest-bearing debt, he is liable for the loss to the estate occasioned by his unjustifiable neglect and delay in paying the debtor: see *Seaman v. Dee*. (1)

But he is not liable for loss occasioned to the estate by reason of his paying, in exercise of his right to prefer, a non-interest-bearing debt before an interest-bearing debt. This is established by *Turner v. Turner* (2) and by *Robinson v. Cumming* (3), where the executor's claim for fifteen years' interest on his own interest-bearing debt was allowed. The plaintiff has not proved or attempted to prove that the executors had, at any time before the actual payment of the mortgage debt, assets in hand sufficient for its payment, much less that they had assets which they were bound so to apply. There is not even an allegation to any such effect in the plaintiff's statement of claim.

For these reasons I think that no declaration of the executors' liability ought to be made, and, on the facts, that no sufficient ground has been shewn for granting an inquiry.

It will be observed that I have not rested my judgment on any supposed duty of the executors to obtain probate.

It may be that their delay in obtaining probate would not afford any defence to a charge of wilful default, or of negligence, for which otherwise they were accountable. My opinion is that it would not. It is plain that the mortgagees, being creditors, and also that any of the residuary legatees, could have cited them to take or refuse probate. It would seem that this is the only remedy against executors for not taking out probate.

VAUGHAN WILLIAMS L.J. The first question to be decided in this case is whether Stevens, the executor who has proved, can be made responsible to the estate for the interest which has been received by the equitable mortgagee of a policy of insurance on the life of the testator, in respect of the period during which the mortgagee was unable to get the policy moneys from the office by reason of the neglect of the executor

(1) 2 Lev. 40.

(2) 1 Jac. & W. 44.

(3) (1742) 2 Atk. 409, 411.

to obtain probate, and thus put himself in a position to give a proper receipt for the policy moneys. If the executor is responsible, it must be either in respect of accounts of assets received or which, but for his wilful default, he might have received, or because he has been guilty of such mismanagement in the administration as to make him liable to make good the loss occasioned thereby.

Now, as to wilful default, accounts are not taken on this footing, unless there has been a loss of assets received, or assets which might have been received; and there is some difficulty in saying that the executor either received or might have received these policy moneys. He clearly could under no circumstances ever have received the policy moneys, except subject to the right of the mortgagee, and never could have claimed as against the mortgagee to have paid over to him one shilling of the policy moneys until the whole mortgage debt and interest had been paid; and inasmuch as the receipt by the mortgagee of the whole policy moneys would have left a large portion of the mortgage debt unpaid (that is to say, the portion which was only paid many years later when certain promissory notes payable seven years after date, which formed part of the security moneys, were realized), it follows that there were, in respect of these policy moneys, no assets which the executor received or might have received but for his wilful default.

It is true that he gave a receipt to the office for the policy moneys; but the policy, although legal assets, was subject to the lien of the equitable mortgagee, and he was as much entitled to receive the amount secured to him from the insurance company as if he had had an assignment; and if the executor had refused to concur in the receipt to the office, a Court of Equity would have ordered payment to the creditor: per Littledale J. (*Glaholm v. Rowntree* (1)). This disposes of the case so far as it claims to have the accounts taken on the footing of wilful default.

The next question is whether the executor could be charged on the taking of a common account with the interest which

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became payable on the unreduced debt during the period of delay in obtaining probate. Now, the only mode in which this could be worked out is by charging the executor with the full amount of the policy moneys as a legal asset received, and allowing him against this only the principal and interest on so much of the debt as would have remained if the policy moneys had been received at the time when they might have been received if the executor had not delayed to obtain probate, and by disallowing him the interest on that part of the debt which might have been paid off, but was not paid off by reason of the executor's delay in obtaining probate. This is rather like the case of disallowing the executor sums paid for interest accruing in a case where, having assets sufficient to pay a debt carrying onerous interest, he neglects to pay off the debt, and subjects the estate to interest for which it would not have been liable if he had made proper use of the assets.

But it is obvious that there is this material difference: that in the one case the executor has the assets in hand, and fails to apply them, while in the other he has no assets in hand; and, according to my understanding of the taking of a common account, such an account only relates to assets actually received. It seems, therefore, that in the present case the executor cannot be charged with this interest, either on the taking of an account on the footing of wilful default, or on the taking of a common account.

I shall next deal with the question whether the executor can be charged by an action for damages for negligence in administration; but, before doing so, I wish to observe that if he would be liable in such an action, I am not sure that his liability might not be enforced by directing an inquiry in the course of taking the common account, without any substantial action for negligence.

As to the liability of the executor to an action, it is stated generally in Williams on Executors that an executor is liable as on a devastavit, not only for loss arising by a direct abuse of the assets by spending or consuming them, but also for waste by such acts of negligence and wrong administration as will disappoint the claimants on the assets; and it would

seem from the case of *Hall v. Hallet* (1) that this liability may include a loss arising to the estate by reason of the estate having to bear charges which it would not have had to bear but for the culpable negligence of the executor.

I may observe here that none of the forms employed at law for charging an executor as on a devastavit seem to be so framed as to include a claim for damages for negligent administration, all the forms being framed in terms applicable only to the loss of assets received, or which might have been received; but assuming that there is no liability which could be enforced at law, he might still be made liable by an action or bill, as it used to be called in equity, to make good the loss to the estate arising from his negligent administration, as seems to have been done in *Hall v. Hallet*. (1) On the whole, I think that such an action would lie; but the plaintiff would have to establish both the negligence and the damage resulting to the estate thereby; and I am not satisfied that either the negligence or the damage has been established in the present case.

First, as to the negligence. I think no action would lie for neglect to take out probate—no such action appears ever to have been brought; and I think that plaintiff's only remedy is by citing the executor in the Probate Division. The negligence, whether you regard it as negligence to take out probate, or as negligence in not tendering the insurance company an official receipt, was not negligence of any duty arising from the trust accepted by him by intermeddling, the acceptance of which he was by intermeddling estopped from denying. He was always willing to give such receipt as he could independently of probate, and the negligence to take probate was mere negligence to obtain legal proof of the office the acceptance of which he was estopped from denying. Secondly, as to the damage. I am not satisfied that there would have been any surplus on the realization by the mortgagee of his securities, and I doubt whether such damage would not have been too remote even if proved. The damage resulted not only from the executor not taking probate and tendering an official receipt, but also from the fact that no one else interested chose to take out

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(1) 1 Cox, 134.

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Taking the view which I do, it is unnecessary to consider whether the fact that Stevens has now proved increases his liability; but there is a good deal of authority to shew that the liability of a named executor who has not proved but has inter-meddled is limited to those assets which he has received (see *Read v. Truelove* (1), *Lowry v. Fulton* (2), Williams on Executors, 9th ed. p. 1736, et seq.). Such an executor is not an executor de son tort; but in this respect his liability seems to be limited in the same way: *Rogers v. Frank*. (3)

Solicitors: *S. S. Seal, for F. T. Steavenson, Darlington;*
Whites & Co., for M. S. Emerson, Norwich.

(1) (1762) Amb. 417.

(2) 9 Sim. 115.

(3) (1827) 1 Y. & J. 409.

W. W. K.

F. PINET & C^{IE} v. MAISON LOUIS PINET, LIMITED. NORTH J.

[1897 P. 1642.]

[1897 P. 2394.]

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Nov. 30;
Dec. 1.*Trade Name—Injunction—Form of Order.*

Where a person had taken a name as his own name for the purpose of using the name in trade to pass off his boots and shoes as the manufacture of another whose real name it was, he was restrained absolutely from using the name in connection with the sale or manufacture of boots or shoes.

ONE Louis Leper St. Leger Dunch, formerly a solicitor in Ireland, and who since had successively carried on different occupations under different names, in 1892 took the name of Pinet. He then commenced business as maker of boots and shoes chiefly, as he alleged, of special make. He sold his business to a limited company called Maison Pinet, Limited, formed for the purpose of taking over and carrying on that business. The partners in F. Pinet & Cie, the plaintiffs in two actions now before the Court, boot and shoe manufacturers of Paris, having a large wholesale business in London, had previously brought an action against that company and Louis Pinet, in which, on October 27, 1897, the Court of Appeal confirmed an order of Stirling J. restraining the defendants from using the name of Pinet in connection with the sale or manufacture of boots and shoes without distinguishing their articles from those of the plaintiffs.

On November 3, 1897, a new company, of which Louis Pinet was a director, with larger capital, was registered under the name of Maison Louis Pinet, Limited, to take over and carry on the business of Maison Pinet, Limited. Maison Pinet, Limited, had previously gone into voluntary liquidation for the purpose of selling their business to the new company, and a conditional contract with a trustee for the proposed company had been made. The plaintiffs commenced two actions, to both of which Maison Louis Pinet, Limited, Louis Pinet, and the other directors of that company, and Maison Pinet, Limited, were defendants, and to one of which the liquidator of Maison Pinet, Limited, and the trustee for the purchasing company, were also

NORTH J. defendants. In those actions motions for interlocutory injunctions were now made (inter alia) to restrain the defendants from manufacturing or selling boots and shoes in connection with the name Pinet, and from selling or parting with, or dealing with the business of Maison Pinet, Limited, in connection with the name Pinet. There was no evidence in the former action that the defendant Louis Pinet had ever borne another name : in fact the discovery was only made after October 27, 1897. The judge held, on the evidence now before him, that Louis Pinet had adopted the name of Pinet for the purpose of passing off boots and shoes of his manufacture for those of the plaintiffs' manufacture.

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Moulton, Q.C., Swinfen Eady, Q.C., and Sebastian, for the plaintiffs. In this case the defendants are not using a name which any of them are entitled to ; the name Pinet having been adopted for a fraudulent purpose, its use will be absolutely prohibited : *Burgess v. Burgess* (1) ; *Reddaway v. Banham* (2) ; and an injunction will go to restrain them dealing with a business connected with the name Pinet in order that no one else may be able to take up the fraud : *In re Brinsmead & Co.* (3)

Vernon Smith, Q.C., and E. Brodie Cooper, for the defendants. We are willing to submit to an injunction limited in form. The injunction was limited in the former action ; it is the universal practice in trade-name cases to limit the injunction by adding such words as "without distinguishing the defendants' goods from those of the plaintiffs' manufacture." The law is settled, if not settled before, by the case of *Thompson v. Montgomery* (4)—the Stone Ale case. The name of Pinet is the defendants' real name, and, even if it could be held that the name was taken originally for a fraudulent purpose, an injunction restraining absolutely the use of the name is more than is necessary for the protection of the plaintiffs. In the Stone Ale case (4) it was found, in point of fact, that the defendant had gone to Stone to take the name, yet he was not absolutely injured. The analogy between the two cases is complete, if a

(1) (1853) 3 D. M. & G. 896.

(2) [1896] A. C. 199, 209.

(3) [1897] 1 Ch. 46.

(4) (1889) 41 Ch. D. 35.

fraudulent intent is to be imputed to the defendant Pinet. If the defendants are restrained from improperly using the name Pinet, it is superfluous to make any order as to dealing with the business.

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NORTH J., after stating the facts, and holding that Louis Pinet took that name for the fraudulent purpose of getting the benefit of the plaintiffs' reputation, and referring to the confirmation of the previous injunction in the Court of Appeal, continued:—At that time it was asserted by Louis Pinet that Pinet was his real name, and the contrary was apparently not known or suspected: and the case was dealt with on the footing that he was using his own name, and could not be restrained from trading under it. The facts now proved shew that that basis was wrong.

No doubt a man may by law change his surname if he likes: he cannot be prevented from doing so, and an Act of Parliament is not necessary for the purpose; but if he wants to have the benefit arising from any such change, it must be an honest change: it must not be a change for the purpose of putting on the semblance of somebody else, and passing off his goods as the goods of that other person. It is quite clear to me in this case that the defendants cannot get any benefit from the fact that a short time since Louis Pinet took that name when it was not his own; they cannot have any advantage from that any more than they could have had if he had never taken that name at all. It seems to me quite clearly a case in which the plaintiffs are entitled to an order against the defendants to restrain them from interfering with the thoroughly well-known trade of the plaintiffs by using the name of Pinet. The injunction was granted by the Court of Appeal to restrain the old company from using the name without distinguishing and pointing out that they were not the plaintiffs' company. The fact that such an order has been granted has not deterred the new company from attempting to do the very same thing. Under those circumstances, I think an injunction must be granted to restrain them from using the name "Pinet" at all; in connection, of course, with the manufacture or selling of

NORTH J. boots and shoes. I do not go beyond that, or restrain them from using the name for any other purpose they think fit, and which is within their memorandum of association: but I must restrain them from using the name "Pinet" at all in the manufacture or sale of boots or shoes.

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I think the case is very like that of *Brinsmead v. Brinsmead* (1), with an additional element which makes it worse. In that case there were some persons concerned whose real names were Brinsmead. In the present case there is nobody whose real name is Pinet, although one of the defendants has adopted the name for a fraudulent purpose.

The judgment for an injunction as finally entered was in the following terms:—

"Upon the two several motions for injunction this day made unto this Court by counsel for the plaintiffs in the respective actions, and upon hearing counsel for the defendants in both actions, and upon reading the writs in both actions, the order of the Court of Appeal in the previous action, and the various affidavits and exhibits in both actions, and the plaintiffs and defendants in both actions by their counsel consenting that the hearing of the said motions should be treated as motions for judgment in the respective actions, and the plaintiffs by their counsel waiving any claim for damages: This Court doth order that the defendants Maison Louis Pinet, Limited, and the defendant Frederick William Shepherd, the liquidator thereof, be perpetually restrained from transferring, selling, or dealing with any right to use the name 'Pinet' or any title or description including that name in connection with the manufacture or sale of boots or shoes.

"And it is ordered that the defendants Maison Louis Pinet, Limited, Frederick Westwood Potter, William Alfred Phillips, Arthur Joshua Eastmead, and Louis Marius Pinet and Maison Pinet, Limited, Frederick William Shepherd, and Walter Kelsey, be perpetually restrained from using the said name 'Pinet' or any such title or description as aforesaid in such connection as aforesaid, and from doing any other act or thing conferring or purporting to confer either directly or indirectly upon any other person or persons any right to use the said name or any such title or description as aforesaid in such connection as aforesaid, and from selling or offering for sale any boots or shoes not of the plaintiffs' manufacture under the name of 'Pinet's Special Boots and Shoes,' or 'Pinet's Boots and Shoes.'"

Solicitors for plaintiffs: *Wilson, Bristows & Carpmael.*

Solicitor for defendants: *George Boyd Wickes.*

(1) Not reported; but referred to in *In re Brinsmead*, [1897] 1 Ch., at pp. 52, &c.; 413, &c.

D. P.

PEGGE v. NEATH AND DISTRICT TRAMWAYS
COMPANY, LIMITED.

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Nov. 23.

[1894 P. 2426.]

*Company—Debenture—Agreement to give Debenture when called upon—
Equitable Security—Debenture-holder's Action.*

In 1882 a company borrowed money from P., for which they gave him a promissory note bearing interest at 5 per cent., and undertook that they would at any time, when called upon by the holder of the note, issue for the amount debentures, bearing interest at $4\frac{1}{2}$ per cent., of a series which constituted a second charge on the company's assets, subject to a charge in favour of a first series of debentures previously issued. In 1894 an action was brought by debenture-holders against the company to enforce their security. P. was one of the plaintiffs, as a holder of a first debenture, the other plaintiff being a holder of a second debenture. P. did not then claim to be a holder of a second debenture. He had continued to receive interest at 5 per cent. on his promissory note, and had not applied to the company for debentures for the amount. After judgment in the action P. for the first time claimed to have debentures of the second series issued to him for the amount of his debt. The whole of the second series had not been issued, and the amount remaining unissued was sufficient to answer P.'s claim :—

Held, that P. had not waived his right under his agreement with the company; that he was in equity a holder of debentures of the second series for the amount of his debt; and that he was entitled in respect of that amount to share in the distribution of the company's assets as if he were a legal holder of debentures of the second series.

In re Queensland Land and Coal Co., [1894] 3 Ch. 181, followed.

SUMMONS (dated November 26, 1896) by Charles Pegge (one of the plaintiffs in the action) asking that the defendant company might be directed to issue to him debentures, constituting a second charge upon the company's assets, to the amount of 400*l.*, or, in the alternative, that he should be allowed to rank with the holders of such second debentures to the amount of 400*l.*, and to participate *pari passu* with them in any distribution of the assets of the company available for the payment of such second mortgage debentures.

The action was commenced on September 28, 1894, by Pegge and J. D. Llewellyn as plaintiffs, "on behalf of themselves and

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In November, 1875, the company issued a series of first mortgage debentures, for the total sum of 6000*l.*, bearing interest at 5 per cent. per annum, and purporting to be a first charge on the property and undertaking of the company. The statement of claim alleged that the plaintiff Pegge was the holder for value of one of these first debentures for the sum of 600*l.*

In January, 1879, the company resolved to issue a series of second mortgage debentures, for the total amount of 10,000*l.*, bearing interest at 4½ per cent. per annum, and constituting a charge on the property and undertaking of the company after and subject to the first mortgage debentures. The whole of these second debentures were not in fact issued.

The statement of claim alleged that the plaintiff Llewellyn was the holder for value of one of the second debentures for 250*l.*

It was alleged that default had been made by the company in the payment of the principal of the plaintiffs' debentures.

The statement of claim did not allege that the plaintiff Pegge was the holder of, or entitled to, any of the second debentures.

The plaintiffs claimed a declaration that they, and the other holders of the debentures of the company of the first and second series respectively, were entitled to a first and second charge respectively upon all the property and undertaking of the company; that the ordinary accounts might be taken; and that the charge created by the debentures might be enforced by foreclosure or sale.

On October 3, 1894, a receiver was appointed.

By the judgment at the trial of the action, on January 12, 1895, it was declared (1.) that the plaintiff Pegge, and all other holders of mortgage debentures of the company, of the series dated November, 1875, were entitled to a first charge on the undertaking and property of the company; (2.) that the plaintiff Llewellyn and all other holders of mortgage debentures of the company of the series dated January, 1879, and

subsequent thereto, were entitled to a second charge on the undertaking and property of the company. Various accounts and inquiries were directed (*inter alia*)—an inquiry “what debentures of both the said series respectively are now outstanding and unpaid, and what persons are the holders of the same respectively.”

On August 10, 1896, the tramway was sold under the Tramways Act, 1870, and the proceeds of sale were paid into court in this action.

Before the master had made his certificate the above summons was issued by the plaintiff Pegge.

It was supported by his own affidavit, dated October 7, 1896, and filed December, 3, 1896, in which he said that he was a director of the company in November, 1882. The company were then being sued for a sum of 800*l.* upon an overdue debenture. As a means of raising the money the secretary was, at a meeting of directors on November 2, 1882, directed to interview the directors severally, offering them for any money advanced by them the promissory note of the company, with the undertaking that the company would, at any time when called upon by the holder of such promissory note, issue debentures for the amount of a series then being issued which constituted a second charge upon the company's assets. At a directors' meeting held upon November 11, 1882, the secretary reported that the only directors prepared to make an advance upon the above-mentioned terms were Mr. Whittington, Mr. Curtis, Mr. Rowland Thomas, and the plaintiff Pegge. Accordingly it was agreed that the sum of 700*l.* should be advanced upon these terms, as follows, namely, 300*l.* by Pegge, 200*l.* by Thomas, 100*l.* by Curtis, and 100*l.* by Whittington. The advances were then accordingly made, and promissory notes of the company were signed and handed to the lenders, and the money so raised was applied by the directors in redeeming the overdue debenture.

On October 28, 1884, the company were again being pressed to pay their overdue mortgage debentures, and, upon an express agreement that the same should be advanced upon the same terms as the prior advance, Pegge again advanced 100*l.*, for which

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NORTH J. amount a promissory note of the company was issued to him, the money being applied by the directors in the redemption of overdue debentures. In accordance with the agreement the company had when called upon issued to Curtis, Thomas, and Whittington mortgage debentures of the second series for the amounts advanced by them respectively. At the date of the commencement of the action Pegge had not applied for the issue of debentures to him, but interest had up to that time been regularly paid to him by the company upon the promissory notes for 400*l*.

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This evidence was confirmed by that of Mr. Lewis, the former secretary of the company.

In another affidavit of the plaintiff Pegge, sworn on January 12, 1897, he said that he had never previously applied for the issue of the debentures, although he was frequently up to the year 1894 asked by one or other of the directors to exercise his option of converting the notes into debentures, with a view to the reduction of the interest payable to him.

This summons was the first claim made by Pegge for the issue to him of second debentures in respect of his advance of 400*l*. to the company.

On February 15, 1897, on the hearing of the summons in chambers, North J. ordered that, in addition to the accounts and inquiries directed by the judgment, the following inquiry should be made, namely, "An inquiry whether there are any and what other charges or incumbrances, and as to their priorities, and what property is subject to them." And the summons was ordered to stand over until this inquiry had been made, and the master was ready to certify the result thereof.

The master by his general certificate, dated June 30, 1897, found what debentures of both issues were outstanding and the names of the holders of the same respectively, but he did not find that the plaintiff Pegge was entitled to any debenture of the second series. And, in answer to the additional inquiry, the master found that "there are no other charges or incumbrances upon the said property, other than the said debentures." He then stated the claim of the plaintiff Pegge, and added, "The said claim has been disallowed."

The summons now came on to be heard, with the hearing of the action on further consideration. The summons had been amended by asking for the variation of the master's certificate in accordance with the claim made by the summons.

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Dighton Pollock (*Christopher James* with him), for the summons. Pegge had never, till he made this claim, exercised the option given to him to call for debentures at any time, and he is entitled to exercise that option now. The company and the debenture-holders have had the benefit of his money. He is in equity a holder of debentures of the second series for the amount of his promissory notes, and is entitled to stand in the same position as if he were a legal debenture-holder: *In re Queensland Land and Coal Co.* (1) There was a definite contract between the company and him at the time when he advanced his money, and interest at 5 per cent. has been paid by the company to him up to the issue of the writ in this action. He is entitled to interest at $4\frac{1}{2}$ per cent. from the date of his demand for debentures, i.e. from the issue of the summons.

Ashton Cross (with him *Swinfen Eady, Q.C.*), for the plaintiff Llewellyn. Pegge made his claim in the action only as a holder of first debentures. He ought to have made his election to alter his position sooner. He went on for ten years receiving interest at 5 per cent. as the holder of a promissory note. At the most the agreement to give him debentures was a verbal one, and his conduct shews that he has elected not to exercise the right to call for them. It is too late to exercise the option now after other persons have acquired rights. The option should have been exercised within a reasonable time, and it would be utterly unreasonable to allow him to exercise it now. If he can now acquire the rights of a debenture-holder, the provisions of s. 43 of the Companies Act, 1862, for the registration of mortgages and charges affecting the property of a limited company will be rendered nugatory.

Hume-Williams, for the company.

Dighton Pollock, in reply. There is nothing to shew that

NORTH J. Pegge has waived his right. The company is still a going concern. The contract was that he should receive interest at 5 per cent. as long as he liked. The period during which the company is existing, and the debt remains unpaid, is a reasonable time within which to exercise the option.

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NORTH J. There is no doubt as to the facts. Mr. Pegge's own statement as to what took place when he made the advance to the company is confirmed by the evidence of Mr. Lewis, the then secretary of the company, and it is in no way contradicted. [His Lordship read the above-quoted statements contained in Mr. Pegge's affidavit, and continued :—]

Accepting this statement as correct, I think that the undertaking of the company, to issue debentures for the amount of the promissory note "at any time when called upon by the holder," means at any time while the promissory note is running, i.e. while the debt is unpaid. It is said that Mr. Pegge ought to have exercised his option to call for a debenture when debentures were given by the company to other directors who had advanced money to the company in the same way. I can see no reason why he ought to have exercised his option at that time. It is clear that the company then treated the obligation as still subsisting. What has taken place since to shew that Mr. Pegge is not still entitled to his promissory notes, together with the benefit of the agreement to give him debentures of the second issue in place of the notes, when he chooses to ask for them? Fortunately for him the whole of the second debentures have not yet been issued, and enough remain to answer his demand. He has continued to receive interest at 5 per cent. on the promissory notes. He was pressed by the company to take debentures instead of the notes, but he declined to do so. I do not see how that refusal could deprive him of his option. Then came the writ in the present action, in which Mr. Pegge sues as the holder of a first debenture, and Mr. Llewellyn, his co-plaintiff, as the holder of a second debenture, and judgment has been given in that action. The plaintiff Pegge in his statement of claim represented that he was the holder of only one debenture of the first series; but I think it is clear that,

by making that claim in the first instance to one debenture, he would not have deprived himself of the right, if he had in fact held other debentures of the first series, to come in under the judgment and rank *pari passu* with the other holders of first debentures, in respect of all his first debentures. And I cannot see how, by not at first mentioning his claim to debentures of the second series, he has deprived himself of any right which he had under his agreement with the company. Then the company got into difficulties, and proceedings were taken against them by the county council for penalties. The tramway has been sold, and 8000*l.*, the proceeds of the sale, is now in court. On October 7, 1896, Mr. Pegge for the first time made a claim to be entitled to debentures of the second series. The reason for his making that claim then is obvious. There is not enough to pay the holders of debentures of the second series in full, and there is nothing for the general creditors of the company. In my opinion, he is entitled now to have debentures of the second series issued to him for the amount of his promissory notes. In so deciding, I am following my own decision in *In re Queensland Land and Coal Co.* (1), where, indeed, I was following earlier decisions. Mr. Pegge is in equity a holder of second debentures, and he is entitled now to stand on the same footing in the distribution of the company's assets as if he were a legal holder of second debentures. He had under his agreement with the company two rights—a right to a promissory note and a right to have debentures for the amount of the note at any time when he should call for them; and I cannot see that anything has taken place which can deprive him of his rights under the agreement. But in my opinion he is entitled to interest on his debentures only from the date of the filing of his affidavit of October 7. As, however, the company have no assets out of which interest can be paid, this is a matter of no importance. Of course, Mr. Pegge cannot be compelled to refund or bring into account any interest which he has received in respect of the promissory notes; and for any further interest at 5 per cent. upon the notes which accrued due before the date of his election to take

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Solicitors: *Tamplin, Tayler & Joseph, for C. Valentine Pegge, Neath; Everett & Hodgkinson.*

W. L. C.

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[1897 S. 1027.]

International Law—Action by Foreign Sovereign—Cross Proceedings.

A foreign Sovereign suing in the courts of this country submits to the jurisdiction to the extent only that (1.) he must give discovery; (2.) cross proceedings in mitigation of the relief claimed by him can be taken against him.

A foreign State sued to restrain dealing with, and for the appointment of a new trustee of, funds lodged in England in the names of a trustee for the plaintiffs and a trustee for the defendants who hold a concession from the plaintiffs for the construction of a railway in their territory. A counter-claim for damages in respect of alleged breaches of the terms of the concession was struck out.

THE defendant company were a Belgian corporation constituted in 1882 for the purpose of acquiring and working a concession from the plaintiffs, the South African Republic, to make a railway in the territory of the plaintiffs. The concession was granted to the defendants, and under its terms they had power, with the sanction of the plaintiff Government, to issue bonds to the amount of 1,500,000*l.*, the payment of interest on which was guaranteed by the plaintiff Government. In June, 1894, such bonds to the amount of 500,000*l.* having been already issued, the defendant company negotiated with the plaintiff Republic for sanction to issue the rest of the bonds, and obtained such sanction on the basis of the following term contained in a letter written on their behalf:

"That the proceeds of the issue shall be placed on deposit in the joint names of Mr. Baelaerts van Blokland and a trustee named by the company, so that all moneys required for the construction, &c., can only be drawn on the joint signatures of the two trustees." Under this arrangement large sums arising from the issue of such debentures were deposited with two London banks in the names of Baelaerts van Blokland, the commissioner in Europe of the plaintiff Republic, and Baron Robert Oppenheim as trustee for the defendant company.

Baelaerts van Blokland died on March 14, 1896. The defendants thereupon claimed a right to deal as they pleased with the funds then standing in the sole name of their nominee: and in March, 1897, the plaintiffs commenced this action against the defendant company, the two banks, and Baron Oppenheim. By their writ they claimed (inter alia) an injunction to restrain the defendants dealing with the funds till trial of the action.

The action was brought on on motion for an injunction, the money on deposit was paid into court, and the defendant bankers were dismissed. The plaintiffs put in a statement of claim by which they claimed a declaration that they were entitled to nominate a trustee in the place of Blokland; the appointment of such a trustee on their nomination; and the transfer of the funds in court to the trustees when the new trustee had been appointed.

The defendant company put in a statement of defence and counter-claim by which they alleged various breaches by the plaintiff Government of the terms of the concession; the writing of a letter by an agent of the plaintiffs asserted to be libellous; and that the plaintiffs were unjustly and in bad faith taking proceedings in the Transvaal courts to avoid the concession.

By the counter-claim the company claimed (1.) payment of three several sums of 60,000*l.*, 1800*l.*, and 147,000*l.* as damages for alleged breaches of the terms of the concession; (2.) 100,000*l.* damages for libel; and (3.) that the plaintiff Republic might be restrained from taking or continuing proceedings in the courts of the South African Republic for the purpose of

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NORTH J. having the said concession declared void and its property expropriated, or, in the alternative, 500,000*l.* damages.

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On July 26, 1897, North J., on summons by the plaintiffs, made an order in chambers to strike out the allegations in the counter-claim as to libel and the second head of the defendant company's claim. The defendants appealed, and the Court of Appeal affirmed the order of North J.: see *South African Republic v. La Compagnie Franco-Belge, &c.* (1)

This was a summons, brought on as a motion, on the part of the plaintiff Republic to strike out the rest of the counter-claim.

Swinfen Eady, Q.C., and *Waggett*, for the plaintiffs. A foreign Sovereign, or Sovereign State, cannot be sued in the courts of this country unless he has submitted to the jurisdiction. The bringing an action here is a submission to this limited extent and no further; a foreign Sovereign cannot go on with his action unless (1.) he gives discovery; (2.) he submits to the decision of the Courts here in respect of any matter that can be pleaded either by way of defence, or cross-action, or, which is now the same thing, counter-claim by way of mitigation of the judgment he is himself seeking. To this may be added that he may be made a party to proceedings against a third person, to give him an opportunity of being heard on the decision of a controversy between the proper parties, in which he is interested: *Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co.* (2); *Duke of Brunswick v. King of Hanover* (3); *Rothschild v. Queen of Portugal* (4); *Strousberg v. Republic of Costa Rica* (5); *Mighell v. Sultan of Johore* (6); *The Parlement Belge* (7); *Prioleau v. United States* (8); *The Newbattle.* (9) The decisions as to cross-suits before the Judicature Acts apply to counter-claims: *South African Republic v. La Compagnie Franco-Belge, &c.* (1); *Birmingham Estates Co. v. Smith.* (10) The counter-claim is, there-

(1) [1897] 2 Ch. 487.

(2) [1895] A. C. 644.

(3) (1844) 6 Beav. 1.

(4) (1839) 3 Y. & C. Ex. 594.

(5) (1880) 29 W. R. 125.

(6) [1894] 1 Q. B. 149.

(7) (1880) 5 P. D. 197.

(8) (1866) L. R. 2 Eq. 659.

(9) (1885) 10 P. D. 33.

(10) (1880) 13 Ch. D. 506.

fore, not one that can be brought against the plaintiff State. NORTH J.

Even if these proceedings were between subjects of the realm, this counter-claim is so unconnected with the claim—a claim that merely asks for the appointment of a new trustee—that it would be struck out: Order XIX., rr. 2, 3, Rules of Supreme Court; for it cannot be conveniently disposed of in the action.

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Vernon Smith, Q.C., and Whinney, for the defendant company. A foreign Government, or domiciled foreigner, by coming to the courts of this country to sue, submits to the jurisdiction so far as the defendants to the proceedings commenced by them are concerned, certainly to the extent of actions relating to the subject-matter of their own actions. That is the result of the cases cited on the other side and of other cases, such as *King of Spain v. Hullet* (1); *Griendtoven v. Hamlyn* (2), so far as they apply to this point. The plaintiffs are seeking to have a new trustee appointed of funds which the defendants say have been placed in the names of trustees on terms which the plaintiffs have broken, and it is inequitable that they should any longer have control over the funds which belong to the defendant company. The breaches of the terms of the concession alleged are so intimately connected with the subject-matter of the dispute raised in the action that justice can only be done by adjudicating on the whole matters in dispute in one action; if the dispute had arisen between two subjects, the whole matter would probably be brought before the Court by action and counter-claim.

The Court will not decide the point at this stage. The counter-claim (apart from the claim based on libel, now struck out) deals only with matters raised by way of defence; the Court will require a defence to the counter-claim to be put in; the present application, if there is anything in it, should have formed part of the former summons.

NORTH J. I will not trouble you, Mr. Swinfen Eady. I think that the application to strike out the whole counter-claim is well founded. The second paragraph in the prayer of that

(1) (1833) 1 Cl. & F. 333.
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(2) (1892) 8 Times L. R. 231.
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NORTH J. counter-claim has been already dealt with by me in chambers
1897 and in the Court of Appeal. It remains to consider the subject-
SOUTH matter of the first and third paragraphs.

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Now, the history of the case is very shortly this. The plain-
tiffs are the South African Republic, a foreign Sovereign State
suing in the courts of this country. They entered into an
agreement with the defendants by virtue of which large sums
were deposited in the names of two persons, one the nominee
of the Government, the other the nominee of the defendant
company; and those funds were put in their hands for the
purpose of seeing that they were properly applied to the objects
of the concession. The views that the plaintiffs and the defend-
ants respectively took as to the proper application of those funds
were widely divergent. One of those two nominees, the nominee
of the Transvaal Government, died, and, thereupon, the funds,
which were in this country, passed by survivorship into the
name of and became subject to the control of the surviving
trustee, who was the nominee of the defendants; and he
claimed on behalf of the company which he represented, and
the company claimed that he, as their agent, should deal with
the funds in the way which they said was right, and which the
Government said was wrong. The result, had this action not
been commenced, would have been that the joint fund would
have passed into and been under the sole control of the defend-
ants, who could do what they liked with it. The fund being
here, it had to be protected here, and this action was com-
menced by the South African Republic against the defendant
company, Baron Oppenheim, who was their nominee, and two
banks in which the money was deposited in this country, but
as against which all the proceedings have been stayed since the
money has been paid into court. [His Lordship stated the
effect of the pleadings and the order confirmed by the Court of
Appeal striking out the part of the counter-claim relating to
libel, and continued:—]

They have applied now that the other portion of the counter-
claim may be struck out too. They say that a foreign Govern-
ment coming here to sue can be met by defence or counter-claim
with respect to the matters incident to the subject-matter of the

action brought by the foreign Government; but the plaintiffs deny, and the defendants allege that, by the foreign Government coming here as plaintiffs, they have submitted to the general jurisdiction of the Court, so as to be capable of being caught and sued here in respect of any matter which would be a proper subject of litigation between them if the two parties were private individuals, both resident in this country, and subject to the jurisdiction of its Courts.

Now, on that, several cases were cited as to the position of a foreign Government coming here to sue. There are only two or three that I need refer to very shortly. The first is *Duke of Brunswick v. King of Hanover* (1), where Lord Langdale says—I need only read a few lines of a very long judgment—"The cases which we have upon this point go no further than this; that where a foreign Sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding, which the foreign Sovereign has himself adopted. There is no case to shew that, because he may be plaintiff in the courts of this country for one matter, he may therefore be made a defendant in the courts of this country for another and quite a distinct matter; and the question to be now determined is independent of the fact stated at the bar, that the King of Hanover is or was himself plaintiff in a suit for an entirely distinct matter in this court." It is clear that Lord Langdale considered the law settled. There may be a proceeding against a foreign government plaintiff by way of counter-proceeding, by cross-bill, or, what I take to be not the same as a cross-bill, a bill of discovery—it might be either a bill of discovery, if necessary, or a cross-bill—in the nature of a defence to the proceedings set up by the plaintiff; but not a proceeding setting up against the Sovereign another claim in respect of another and entirely distinct matter.

Then there was a case—*Strousberg v. Republic of Costa Rica* (2)—where the Republic of Costa Rica had sued Strousberg in this country, and judgment had been recovered in that action for them. There had been a final judgment for the payment

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(1) 6 Beav. 38.

(2) 29 W. R. 125.

NORTH J. of large sums of money ; there had been no cross-bill apparently, or cross-action, pending that action ; but, after it was disposed of, and final judgment had been recovered, Strousberg sought to sue the Government of Costa Rica in this country for the purpose of setting up a claim to meet the claim of the Government under the judgment. That proceeding was clearly wrong. If he could have taken any step, it ought to have been to stay proceedings in the action under which the judgment had been recovered ; but in the course of the judgment both the Master of the Rolls and James L.J. made certain observations, not essential for the judgment, but arising out of the matter before the Court, that are useful to be considered. Pollock B. had made an order in chambers allowing service of the writ in this new action upon the ground that it was in the nature of a cross-action. Thereupon the Government entered a conditional appearance and moved to discharge the order. The Court of Appeal decided that the order ought not to have been made, and ought to be discharged. The Master of the Rolls pointed out it was made under a misunderstanding. He said, the learned judge “was told, and he seems to have adopted the statement without sufficient knowledge of the prior proceedings, that it was in the nature of a counter-claim or cross-action, and in that case, no doubt,”—that is to say, if it was a counter-claim or cross-action—“you can make a Sovereign State a defendant, with a view of doing justice in the original action brought by the Sovereign State”—not settling every possible matter in dispute between the parties, but doing justice in the original action. Then James L.J. says : “It appears to me that it is due from one nation to another, that one Sovereign should not assume or usurp jurisdiction over another Sovereign. It is a violation of the respect due to a foreign Sovereign or State to issue the process of our Courts against such Sovereign or State. There is but one exception, if it can be called an exception, to the rule, and that is where a foreign Sovereign or State comes into the Courts of this country for the purpose of obtaining some remedy ; then by way of defence to that proceeding, the person sued here may file a cross-claim against that Sovereign or State for enabling complete

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justice to be done between them. The defendant in that case is, in fact, only giving to the foreign Sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—so as to bring in whatever defence or counter-claim there might be as a set-off. We went recently very fully, in the case of *The Parlement Belge* (1), into the question of the extent to which the Courts of this country ought to go, even as to property of a foreign Sovereign found here, and I have no hesitation, having fully considered the matter, in arriving at the conclusion I have now stated." Then he said there was one other case in which a foreign Sovereign might be joined as defendant to an action, and that was where he was, or was alleged to be, one of several claimants upon a fund over which the Court had jurisdiction. I do not read the part of the judgment relating to that, because it is not material to the case here.

Now, I believe the law is still exactly as it was stated to be at the time Lord Langdale laid it down in the way in which he did. Here the defendant has brought in a counter-claim, and there seem to me to be two questions on it, first of all, whether it is a case in which, having regard to the action in which the foreign Government has submitted to the jurisdiction, this is a case in which a counter-claim such as this can properly be put in; and, secondly, if it is, whether as a matter of convenience, assuming the Court could allow it, it is more convenient that the subject-matter should be dealt with in a separate action, or in this action.

The great object of the defendants in getting it joined in this action is this. In ordinary cases it probably would not matter very much whether they proceeded by counter-claim or cross-action; but if there has to be a cross-action, it cannot be served upon a foreign Government in this country. They want to get a counter-claim to enable them to serve it upon the plaintiffs in the action, and so get jurisdiction against them in respect of these matters. Now, it is a remarkable thing that neither in the statement of claim nor in the defence, so far as my attention has been called to it, and certainly not in the counter-

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claim, is there any suggestion that the Court has to deal with this fund by executing the trusts of it, or that it is for the Court to try the question whether the fund has or has not properly been applied. Proceedings of that sort have been commenced in the country where the property is situated, which is, *prima facie*, certainly the proper tribunal before which these matters must come, and it is conceded that that part of the counter-claim which asks me to restrain the plaintiff Government from taking proceedings in the Courts of their own country cannot be supported. There is also a claim either for such an injunction or 500,000*l.* damages; but, in my opinion, that fails absolutely and entirely, and I do not think that claim to the alternative damages has really been seriously pressed. The more important matter is as to the three sums of money which are the subject of the first head of the counter-claim. There are three sums in respect of which it has been pointed out in various paragraphs of the counter-claim that the Government are alleged to be indebted to the defendants; but they are not sums with respect to which the defendants have any claim whatever upon the fund in question itself. The claim, if any, is against the Government for particular sums, which would have to be paid by the Government out of its general revenues, and for which there is no claim on the fund in question in any way. That being so, I do not see how the claim to recover those sums against the Government can be right, having regard to the passages which I have read from those two cases, and passages similar to which may be found in many other cases. It is a pure pecuniary claim against the Government, entirely outside of and independent of the subject-matter of the present action. It is not in reality a defence at all to the case set up by the Government in that action.

Under these circumstances, it seems to me that these sums are not sums which can be made the subject of counter-claim against the Government; in other words, I do not think the Government can be sued in respect of these matters by way of counter-claim; but even if they could, I certainly think they are so foreign to the subject-matter of the present action that it would not by any means be convenient to unite these matters

with the subject-matters of the action at all. Under these circumstances, the counter-claim must be struck out; but without costs, because I see no reason why the two applications to strike out parts of the counter-claim should not have been combined in one.

Solicitors for plaintiffs: *Clarke, Rawlins & Co.*

Solicitors for defendant company: *Harwood & Stephenson.*

D. P.

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In re DOUGLAS NORMAN & CO.

NORTH J.

Solicitor—Lien for Costs—Waiver—Security given by Client.

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Dec. 3.

A client, on retaining a solicitor to negotiate for her a loan, upon the security of a reversionary interest to which she was entitled, signed a document by which she charged that interest with the payment of the solicitor's costs:—

Held, on the authority of *In re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590, that by taking this security the solicitor had waived his right to a lien in respect of his costs upon the documents belonging to the client which were in his possession.

MOTION by a client that the respondents Messrs. Douglas Norman & Co., solicitors, might be directed, within four days after service of the order, to deliver up to the applicant upon oath (if required) all deeds, books, papers, and writings in their custody or possession belonging to the applicant.

The applicant, Miss Maud Louise Lewis, was a young lady aged twenty-one. She attained that age on May 20, 1897. She was entitled, under the settlement made on the marriage of her father and mother, and an appointment made in her favour by her father, on March 26, 1897, to a sum of 3000*l.*, subject to the life interests therein of her father and mother and the survivor of them.

On May 20, 1897, she signed the following letter addressed to Messrs. Douglas Norman & Co.:—

“Dear Sirs,—Will you please negotiate for me a loan of 1000*l.*, or such other sum as you can arrange and I am willing to accept, upon security of the interests and property after

NORTH J. mentioned, and I request you to make inquiries and obtain all information, valuations, and papers necessary for the above purpose, and I charge the aforesaid interests and property with the payment of your proper costs, charges, valuer's fees and expenses thereof, and of any moneys I may now or hereafter owe you on any account."

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At the foot of the document was set forth the interest of Miss Lewis in the 3000*l.* appointed to her as above mentioned.

The solicitors succeeded in obtaining for her a loan of 225*l.* from one William Nevill, on the security of her reversionary interest in the 3000*l.* The solicitors claimed to be entitled to a lien for their costs upon the documents belonging to Miss Lewis which were in their possession.

Swinfen Eady, Q.C., and *Stewart-Smith*, for the motion. By taking the security the solicitors waived their lien for costs: *In re Taylor, Stileman & Underwood* (1); *Robarts v. Jefferys* (2); *Balch v. Symes*. (3) In the absence of evidence to the contrary, when a solicitor takes from his client security for his costs the true inference is that he has waived his lien for his costs. This inference is especially strong when the client is a young lady who has just attained twenty-one.

Buckmaster, for the solicitors. The lien has not been waived. No decision has gone so far as the Court is now asked to go. In the cases relied upon, the security taken by the solicitor was a bill of exchange or a promissory note, or something of that nature. In such a case the client's right to his papers would, if the lien had not been waived, be in abeyance during the currency of the bill or note, and he might be seriously prejudiced. *Cowell v. Simpson* (4) was doubted by the Court of King's Bench in *Stevenson v. Blakelock*. (5) The ground for holding that a solicitor has abandoned his lien is that he has accepted a special independent security which is inconsistent with the continued existence of the lien. In *In re Taylor, Stileman & Underwood* (1) the security was a promissory note

(1) [1891] 1 Ch. 590.

(3) (1823) T. & R. 87.

(2) (1830) 8 L. J. (Ch.) (O.S.) 137, 140.

(4) (1809) 16 Ves. 275.

(5) (1813) 1 M. & S. 535.

and the deposit of a policy of insurance, and Lindley L.J. said (1), "if a solicitor takes from his client such a security as this solicitor took the *prima facie* inference is that he waives his lien." The ground of the decision in *Roberts v. Jefferys* (2) was that the solicitor acquired a right to interest which he would not otherwise have had. All the decisions are based upon the particular nature of the security given, by which a special right was substituted for the original lien. In most of the cases the solicitor obtained a negotiable security and a right to interest, and the client lost the right to tax the bill.

[NORTH J. referred to *Groom v. Cheesewright*. (3)]

In that case the security given to the solicitor was a mortgage, which probably contained a covenant by the client for payment at a given date. There is nothing of that sort here. The mere fact of accepting security does not destroy the lien.

Swinfen Eady, Q.C., in reply. In *Balch v. Symes* (4) Lord Eldon said (5): "Notwithstanding the Court of King's Bench has expressed a doubt, whether my decision was right in the case of *Cowell v. Simpson* (6), I still entertain the opinion, that an attorney who takes a security abandons his lien." In *Stevenson v. Blakelock* (7) some of the bills given as security were overdue, and one document came into the solicitor's possession after the security had been given. In *In re Taylor, Stileman & Underwood* (8) the promissory note was payable on demand; there was no question about suspending the remedy. In the present case the inference from the letter of May 20 is irresistible that it was not intended that the solicitors should have a lien. Were they to keep the documents with a lien on them for their costs if they failed to negotiate a loan?

NORTH J. I think the order asked for by the notice of motion should be made. I cannot distinguish the present case on any substantial ground from *In re Taylor, Stileman & Underwood*. (8) It seems to me to be on all fours with that case.

(1) [1891] 1 Ch. 597.

(4) T. & R. 87.

(2) (1830) 8 L. J. (Ch.) (O.S.) 137.

(5) *Ibid.* 92.

140.

(6) 16 Ves. 275.

(3) [1895] 1 Ch. 730.

(7) 1 M. & S. 535.

(8) [1891] 1 Ch. 590.

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NORTH J. The distinction suggested is that there the security given by the client to the solicitor was a promissory note payable on demand—a negotiable instrument—whereas here the security is a charge upon a reversionary interest of the client. I cannot see that this makes any difference in principle. And in the present case the agreement with the solicitor was entered into on the very day on which the young lady attained twenty-one. The document was indeed witnessed by her father; but he is not a solicitor, and it does not appear that he has any legal knowledge. The bargain was made at a time and under circumstances which made it the duty of the solicitor to inform this young lady, who was his client, fully of her position—to tell her that he was entitled as a solicitor to a lien for his costs upon her documents which were in his possession, and that he intended to assert this lien notwithstanding the security which she was giving him for his costs. It is not suggested that he gave her any such information. Moreover, there is the circumstance, that this charge for the solicitor's costs which the lady makes is upon a reversionary interest, and it might be a long time before the amount of the charge could be realized. During all that time the solicitor's costs might be unpaid, and it could never, I think, have been intended that he should be entitled to retain the client's papers until the charge should have been realized. In my opinion the solicitor has waived his lien for costs, and an order must be made for delivery up of the client's papers in accordance with her application. The costs will follow the event.

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Solicitors: *Mear & Fowler; Douglas Norman & Co.*

W. L. C.

SHEFFIELD CORPORATION *v.* SHEFFIELD
ELECTRIC LIGHT COMPANY.

NORTH J.

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Dec. 3, 4, 7.

[1897 S. 2055.]

Statute—Construction—Conflict of Statutes—"Annuity."

A Provisional Order authorizing an electric lighting undertaking came into operation on June 27, 1892. It gave a municipal corporation power to purchase the undertaking compulsorily on terms of issuing or transferring to the undertakers such an amount of the corporation stock "as will produce by the interest thereon an annuity of 5 per cent." on capital properly expended. Another Provisional Order, coming into operation on June 28, 1892, took away a power the corporation had, but had not exercised, to issue irredeemable stock. The statutes confirming the two orders received the Royal assent on June 27, 1892:—

Held, (1.) that the statutory price for the undertaking was an amount of irredeemable stock; (2.) that the corporation were not by implication authorized to issue irredeemable stock for the purpose of purchasing the undertaking; (3.) that, therefore, the power to purchase compulsorily was in abeyance so long as the corporation had no power to issue irredeemable stock.

THIS was the trial of a non-witness action. Previously to the coming into operation of the Provisional Order next referred to, the Sheffield Corporation had power, under the Sheffield Corporation Act, 1883 (46 & 47 Vict. c. lvii.), to issue irredeemable Sheffield Corporation stock, but they had not issued any irredeemable stock. The corporation had also statutory power to issue Sheffield Corporation Stock, redeemable in 1925, partly issued and partly not issued. They had not power to issue any other stock.

By the Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1892 (55 & 56 Vict. c. cc.), which received the Royal assent on June 27, 1892, an order for altering the Sheffield Corporation Act, 1883 (therein called the Local Act), was confirmed. This order provided that "from and after the date of the Act of Parliament confirming this order (hereinafter referred to as 'the commencement of this order'), the following provisions shall take effect, namely, Art. I. So much of the Local Act, or of any Act or Provisional Order

NORTH J. amending that Act, as confers upon the corporation the power
1897 to create and issue irredeemable stock shall be repealed."

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The Electric Lighting Orders Confirmation (No. 4) Act, 1892 (55 & 56 Vict. c. ccxix.), which also received the Royal assent on June 27, 1892, confirmed an order empowering the defendant company to supply the Sheffield district with electricity. Sect. 3 of the order provided: "This order shall come into force and have effect upon the day when the Act confirming this order is passed which date is in this order referred to as 'the commencement of this order.'" Sect. 60, sub-s. 1, provided: "The local authority may at any time before the expiration of forty-two years after the commencement of this order give notice in writing to the undertakers requiring them to sell their undertaking to the local authority and thereupon the undertakers shall sell the same to the local authority upon the terms of issuing or transferring to the undertakers such an amount of Sheffield Corporation Stock as will produce by the interest or dividends thereon an annuity of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking and chargeable to capital account provided that if the local authority shall exercise the power conferred by this sub-section before the expiration of ten years from the commencement of this order the local authority shall in addition to the said stock pay to the undertakers a sum equal to the aggregate amount of a dividend of 5 per cent. per annum on the said capital expenditure less the aggregate amount of the dividends declared by the undertakers from the date or dates of such expenditure to the date of the purchase."

Sub-s. 2 gave the corporation power after the expiration of twenty-one years and before the expiration of thirty-one years from the taking effect of the order to require the sale of the undertaking at a valuation, including goodwill; and sub-s. 3 gave the corporation power to purchase the undertaking at a valuation, excluding goodwill, at any time after the expiration of thirty-two years, instead of the forty-two years provided by s. 2 of the Electric Lighting Act, 1888 (51 & 52 Vict. c. 12).

On April 15, 1897, the plaintiff corporation served the defendant company with notice under seal requiring them to

sell their undertaking on the terms of s. 60, sub-s. 1, of the defendants' Provisional Order. NORTH J.

The plaintiffs claimed (inter alia) a declaration that, (1.) by virtue of the notice and s. 60, sub-s. 1, of the order, the defendants were under contract to sell their undertaking; (2.) a declaration of what kind of stock according to the true construction of the contract ought to be issued as part of the consideration for the sale; (3.) specific performance.

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The defendant company in their defence submitted that the stock referred to in s. 60, sub-s. 1, of their Provisional Order was irredeemable stock, and that the plaintiff corporation had no power to issue or transfer irredeemable stock, and could not perform their part of the contract.

Swinfen Eady, Q.C., Ingle Joyce, and R. J. Parker, for the plaintiffs. At the time of the passing of the Act confirming the electric lighting order there was only one kind of Sheffield Corporation Stock in actual existence—namely, 3 per cent. stock redeemable in 1925. There never has been any other Sheffield Corporation Stock. We contend that, on the true construction of the lighting order, taking into consideration the actual state of facts, the stock referred to in s. 60, sub-s. 1, of the order is 3 per cent. stock redeemable in 1925, and the plaintiffs are entitled to specific performance of their statutory contract to purchase the defendants' undertaking.

If our construction of the order in that respect is wrong, and the stock to be issued or transferred is irredeemable, though independently of the lighting order the corporation has no power to issue irredeemable stock, and there is no such stock to transfer, the effect of the order is to give power to issue irredeemable stock for the special purpose of the purchase. It is a principle of construction with reference to statutes that power is implied to do anything necessary to carry out an enactment: *Hardcastle on the Construction of Statutes*, 2nd ed. p. 271; *In re Corporation of Dudley* (1); *Clarence Ry. Co. v. Great North of England Ry. Co.* (2)

It is impossible to imagine, where two Provisional Orders

(1) (1881) 8 Q. B. D. 86.

(2) (1845) 13 M. & W. 706.

NORTH J. relating to the same town are obtained practically at the same time, and confirmed by Acts receiving the Royal assent on the same day, that it was intended that a general repeal contained in one order, should operate to defeat the exercise of a power given by the other. It is immaterial which was numbered first or which actually was assented to first: *Rex v. Justices of Middlesex*. (1)

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The Court will either imply a power in the electric lighting order overriding pro tanto the repeal in the other order, or import into the repeal an exception so far as relates to the issue of irredeemable stock for the particular purpose.

Cozens-Hardy, Q.C., Cripps, Q.C., and Theobald, for the defendants. The ordinary and universal meaning of the word "annuity," unless cut down by some adjective such as "for life" or expressed to be for a specified term, is an annuity in perpetuity; in this case there is no qualification: it would be a most unreasonable construction of the order to hold that the corporation at their option could fix a price that would, according to circumstances, be more or less in their favour, for by their giving stock redeemable at a short date bearing a large interest the vendors would be injured.

Under the plain words of the Local Government Board's Provisional Order the power of the corporation to issue irredeemable stock is taken away, and the Court will not in construing the order import any provision not contained in the four corners of the order itself modifying that clear and simple repeal: *West Derby Union v. Metropolitan Life Assurance Society*. (2) The plaintiffs, therefore, cannot carry out their part of the contract of which they are seeking specific performance, and the action must be dismissed with costs.

Swinfen Eady, Q.C., in reply.

Dec. 7. NORTH J., after stating the facts and reading s. 60, sub-s. 1, of the Sheffield Electric Lighting Provisional Order, proceeded as follows:—In arriving at the price to be paid for the undertaking of the defendants under that provision the first thing to get at is the amount properly expended and chargeable

(1) (1831) 2 B. & Ad. 818.

(2) [1897] A. C. 647.

to capital account. The next thing is to find the amount of the annuity by calculating 5 per cent. upon that capital sum. The third and last step is to consider what amount of Sheffield Corporation Stock at the rate of interest that it bears would be required to provide the annuity.

Now, supposing that the corporation were exercising their power—we will say in the year 1920—I take that date because 1925 is the time at which existing Sheffield Corporation Stock is redeemable. Suppose the capital properly expended was 20,000*l.*, then as the annual amount to be provided is 5 per cent. upon 20,000*l.* or 1000*l.*, you next have to inquire what amount of Sheffield stock at the actual rate, which is 3 per cent., would have to be issued or transferred for the purpose of providing an annuity of 1000*l.*, and that obviously would be more than 20,000*l.* of stock. It would in fact be five-thirds of that sum—something more than 33,000*l.*

Now, assuming for the moment that the corporation had power to issue both redeemable and irredeemable stock, if the contention of the plaintiffs is correct, in 1920 they could give redeemable or irredeemable stock at their option as the price of the undertaking. The corporation might then wish to issue redeemable stock because in 1925 they could pay it off at par, and any excess in value beyond par in 1920 would disappear by 1925. If the corporation could at their option issue redeemable stock in payment for the undertaking, the undertakers, the Electric Lighting Company, would have an annuity of 5 per cent. on their capital for five years; but at the end of five years they would not receive the annuity any longer. The corporation then might say, “We can now borrow money at $2\frac{1}{2}$ per cent.; it is for our interest, therefore, to redeem this stock on which we pay at the present time 3 per cent., and to exercise the power to redeem by paying 100*l.* for each 100*l.* stock.” If at that time they could borrow money at $2\frac{1}{2}$ per cent., being five-sixths only of the rate at which they had previously borrowed, they would redeem, and would hand over a capital sum to the lighting company; and the lighting company, having enjoyed an annuity of 5 per cent. for five years, would then receive a capital sum upon which, if invested at the

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NORTH J. ruling rate in Sheffield Corporation Stock or other like security,
 1897 they could no longer get 3 per cent., but only five-sixths of 5 per
 ~~~~~ cent., or  $4\frac{1}{6}$  per cent. Can that be the meaning of the  
 SHEFFIELD Provisional Order? I do not think it can.  
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SHEFFIELD Sect. 60 of the Provisional Order draws a clear distinction  
 ELECTRIC between the mode of payment by an annuity provided by the  
 LIGHT 1st sub-section, and the payment by a capital sum provided by  
 COMPANY. the 2nd and 3rd sub-sections. It points here to this—that  
 \_\_\_\_\_ what is to be paid on a sale under the 1st sub-section is an  
 annuity of 5 per cent.; but it is to be a continuing annuity,  
 and not an annuity of 5 per cent. for five years reducible at  
 the option of the corporation to  $4\frac{1}{6}$  per cent. for subsequent  
 years; and I think this construction is rather emphasized by  
 the concluding words of the 1st sub-section; which, in addition  
 to giving the annuity at 5 per cent. for the future, provides  
 that, “if the local authority shall exercise the power conferred  
 by this sub-section before the expiration of ten years from the  
 commencement of this order the local authority shall in addition  
 to the said stock pay to the undertakers a sum equal to the  
 aggregate amount of a dividend of 5 per cent. per annum on  
 the said capital expenditure less the aggregate amount of the  
 dividends declared by the undertakers from the date or dates of  
 such expenditure to the date of the purchase.” I think, there-  
 fore, that what is intended is not a payment of capital money,  
 but a transfer of such corporation stock as will produce in  
 perpetuity an annuity of 5 per cent. to the persons whose  
 undertaking is being taken away from them at the option of the  
 corporation under this clause.

But then a complication arises from the fact that on June 27,  
 1892, the day the Act confirming the Electric Lighting Pro-  
 visional Order for Sheffield received the Royal assent, another  
 statute confirming (among other Local Government Provisional  
 Orders settled under the Public Health Act, 1875) a Provisional  
 Order relating to the Sheffield Corporation also received the  
 Royal assent.

A question was raised as to which order took effect first.

I think that no difficulty on this ground can arise, because  
 the times at which the orders came into operation are fixed by

the orders themselves. The order confirmed by the Electric Lighting Orders Confirmation Act provides that the order is to come into effect upon the day when the Act confirming the order is passed, which is referred to as the commencement of the order. The other order provides that it shall come into operation "from and after the date of the Act of Parliament confirming this order." Therefore, one takes effect on the day on which the Royal assent is given; and the other takes effect from and after that day. The distinction, I think, is clear. I need only refer to one case upon the subject, namely, the *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*. (1) That was a case in which on November 24, 1887, a policy of insurance was granted against accidents for a year from that date. On November 24, 1888, an accident occurred, and the question was whether this was within the year or not. It depended altogether on the question whether the year commenced with November 24, or November 25, 1887. If it commenced on the former date, then November 24, 1888, was not within the year: if on the later date, it was. It was decided that the year ran from November 24, that is to say, it did not include November 24, 1887: and the word "from" was likened by the judges in their judgment to the phrase "from and after," which is the very phrase I find in this Act. Therefore, the time when the Provisional Order under the Public Health Act came into operation was the day after the day on which the Provisional Order under the Electric Lighting Act came into operation: and on the earlier day the corporation were in a position to issue both redeemable and irredeemable stock: though no doubt on the following day the power to issue irredeemable stock came to an end.

Then it is said that inasmuch as the order putting an end to the power to create and issue irredeemable stock came into operation on the day after the day on which the electric lighting order took effect, and it is therefore no longer possible to issue irredeemable stock generally, I must compare the two orders, and read the repeal in the later order as containing an implied exception, namely, except so far as may be necessary to carry

(1) [1891] 1 Q. B. 402.

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out any contract made under the Provisional Order made under the Electric Lighting Act; or it is said that if I cannot do that, still at any rate the terms of the contract contained in the Provisional Order under the Electric Lighting Act contain an implied power to issue irredeemable stock. I cannot assent to either of those arguments. The Provisional Order under the Local Government Board is perfectly clear: it provides that so much of the Act as confers upon the corporation power to create and issue irredeemable stock shall be repealed. Those words are conclusive and binding upon me, and I have not been referred to anything in the order itself that can in any way modify or qualify that express provision. Nor can I, because one Provisional Order came into effect on the day after the other Provisional Order came into effect, say that the earlier order is to receive a construction quite inconsistent with its meaning properly construed as it stands. I should say, with respect to that, that I have looked at the recent decision in the House of Lords in the case of *West Derby Union v. Metropolitan Life Assurance Society* (1) as throwing some light upon the mode in which one has to deal with an Act in putting a construction upon it by implication; and I think I should be going entirely contrary to the principles laid down by their Lordships in that case if I were to say that there was any implied qualification of that express repeal.

It was said that two Acts passed on the same day, receiving the Royal assent at the same time, cannot be inconsistent, and that I must in some way reconcile them. But, as I said, it would be impossible for me to modify one by the other even if at the time at which the first in point of date came into operation the corporation had only redeemable stock. Then I am asked, What can be the meaning of the inconsistency? Was there a mistake, or how was it? I do not know how it has happened, and I cannot explain it. I must construe the orders as I find them; and the conclusion I come to is that the contract, the terms of which are contained in the 60th clause of the order, can only be performed on the part of the corporation by their issuing or transferring irredeemable stock. I must

(1) [1897] A. C. 647.

dismiss this action; but, as under the 297th section and the 303rd section of the Public Health Act the Local Government Board have power to modify the existing Provisional Order, and if there has been a mistake they have the power of correcting it by authorizing the issue of irredeemable stock in future to such an extent as may be necessary to give effect to this contract, I dismiss it without prejudice to any future action. The order will be that the Court being of opinion that the stock to be issued or transferred as the purchase-money for the defendants' undertaking is irredeemable stock, and the plaintiffs having no power to issue irredeemable stock, and admitting that there is no irredeemable stock capable of being transferred, dismiss the action with costs, but without prejudice to any action the corporation may be advised to bring to enforce the contract if they become able to issue irredeemable stock.

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Solicitors for plaintiffs: *Sharpe, Parker & Co., for Bramley, Town Clerk, Sheffield.*

Solicitors for defendants: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield.*

D. P.

STIRLING J.

STOKES v. PRANCE.

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[1896 S. 1058.]

July 28, 29;
 Aug. 3;
 Nov. 17.

*Trustee—Solicitor and Client—Investment advised by Solicitor to Trustees—
 Contributory Mortgage—Breach of Trust—Priority.*

Trustees acting under the advice of their solicitors invested 3000*l.*, part of the trust fund, upon the security of a contributory mortgage for 6000*l.*, the remaining 3000*l.* being advanced by the solicitors themselves. The legal estate in the mortgaged property was not vested in the trustees, the mortgage being taken in the names of one of them and of a stranger to the trust. The mortgagees executed a contemporaneous declaration of trust declaring that their names should stand in the mortgage as to the sum of 3000*l.*, part of the said sum of 6000*l.*, and the interest thereof in trust for the trustees, and as to the further sum of 3000*l.*, “residue of the said sum of 6000*l.* and the residue of the interest to become due and payable” under the mortgage, in trust for the solicitors. By another contemporaneous document the solicitors guaranteed to the trustees the sufficiency of the security for the sum of 3000*l.* and interest, and further guaranteed to the trustees the repayment of the 3000*l.* and interest. The solicitors assigned their portion of the security to other persons, and were afterwards adjudicated bankrupts. The mortgaged property having failed to realize the whole of the 6000*l.* :—

Held, that the trustees were not entitled to priority for their 3000*l.* as against the assignees of the solicitors.

THE plaintiffs in this action sought to obtain a declaration that the trustees of the will of Hester Stokes, deceased (of whom the plaintiffs were two, the third being the defendant Frederick Pace Webb), were entitled to be paid a sum of 3000*l.* and interest thereon out of a mortgage debt of 6000*l.* and the security for the same in priority to all other persons claiming to be interested in the said mortgage debt and security, and to have the security realized and the proceeds applied in accordance with the declaration sought.

The mortgage in question was dated March 25, 1864, and was made between John Bale of the one part, and John Bailey of the other part; and thereby two freehold farms in the parish of Uffculme, in the county of Devon, were conveyed by the mortgagor to the mortgagee in fee to secure the repayment of a sum of 6000*l.* with interest thereon at the rate of 4 per cent.

Both the mortgagor and the mortgagee died previously to STIRLING J. December, 1876; and by a deed dated December 30, 1876, and made between John Frederick Bailey and Benjamin Tyley Bailey, the executors and devisees of mortgaged estates under the will of John Bailey, of the first part, John Ansley Bale, the executor and residuary devisee and legatee under the will of John Bale, of the second part, and the defendants Courtenay Connell Prance and Frederick Pace Webb of the third part, the mortgage debt and the mortgaged property were assigned and conveyed to the defendants Prance and Webb as joint tenants in consideration of the payment to the parties of the first part, with the privity and consent of John Ansley Bale, of the sum of 6000*l.*, stated to belong to the defendants Prance and Webb on a joint account. Under this deed the rate of interest to be paid by the mortgagor was increased to 4*l.* 2*s.* 6*d.* per cent. In reality the 6000*l.* was advanced as to 3000*l.* by the three trustees of the will of Hester Stokes, namely, Josiah Yeomans Robins, Frederick Charles Jewesbury, and Frederick Pace Webb, out of funds belonging to them as such trustees; and as to the remaining 3000*l.* by the firm of New, Prance & Garrard (consisting of Herbert New, Courtenay Connell Prance, and George Henry Garrard), then carrying on business as solicitors and money scriveners at Evesham, out of their partnership assets. Messrs. New, Prance & Garrard acted on the occasion of this transfer as the solicitors of the Stokes trustees.

By a memorandum dated January 1, 1877, the defendants Prance and Webb declared as follows: "The principal sum of 6000*l.* intended to be secured to us upon two estates in the parish of Uffculme in the county of Devon by virtue of an indenture of transfer of mortgage dated the 30th day of December, 1876 . . . although expressed to be lent and advanced out of moneys belonging to us on a joint account, yet in truth and in fact the same belongs to the following persons and in the following proportions, that is to say, the sum of 3000*l.*, part of the said principal sum of 6000*l.*, belongs to and is the property of Josiah Yeomans Robins . . . Frederick Charles Jewesbury . . . and myself the said Frederick Pace Webb, as trustees of the will of the late Mrs. Hester Stokes, deceased,

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STIRLING J. and the remaining sum of 3000*l.*, the residue of the said principal sum of 6000*l.*, belongs to and is the proper money of Herbert New . . . , myself, the said C. C. Prance, and G. H. Garrard . . . , and we the said C. C. Prance and F. P. Webb do hereby severally declare that our names shall stand in the said indenture of mortgage as to the sum of 3000*l.*, part of the said sum of 6000*l.*, and the interest henceforth to become due for the same to the extent and after the rate of 4*l.* per cent. per annum, in trust for the said J. Y. Robins, F. C. Jewesbury, and F. P. Webb; and as to the further sum of 3000*l.* (residue of the said sum of 6000*l.*) and the residue of the interest to become due and payable under the same indenture, in trust for the said H. New, C. C. Prance, and G. H. Garrard. And it is hereby agreed that the said indenture of mortgage and the deeds and documents connected with the said security shall remain in the custody and possession of the Gloucestershire Banking Company at the branch bank at Evesham for the respective benefit and advantage of the trustees or trustee for the time being of the estate of the said Hester Stokes, deceased, and of the said H. New, C. C. Prance, and G. H. Garrard, or any person or persons claiming through, under, or in trust for them to the extent and in accordance with the terms of this present memorandum."

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By a second memorandum, dated January 2, 1877, Messrs. New, Prance & Garrard guaranteed the sufficiency of the security and the punctual payment of the principal and interest. The document first recited the transfer of mortgage, and the facts as to the advance of the money by the Stokes trustees and the firm of New, Prance & Garrard, and then proceeded as follows: "And whereas the said Josiah Yeomans Robins, Frederick Charles Jewesbury, and Frederick Pace Webb advanced the said sum of 3000*l.* so belonging to them as aforesaid upon the recommendation of the said Herbert New, Courtenay Connell Prance, and George Henry Garrard, and upon the understanding that they would guarantee the sufficiency of the same security and the punctual payment of the interest thereof in manner hereinafter appearing And whereas the said Josiah Yeomans Robins, Frederick Charles

Jewesbury, and Frederick Pace Webb have agreed to allow the said Herbert New, Courtenay Connell Prance, and George Henry Garrard to receive the interest from time to time to become due upon the said entire sum of 6000*l.* after the reserved rate of 4*l.* 2*s.* 6*d.* per centum per annum, and to accept interest upon the said sum of 3000*l.* so due to them as aforesaid after the rate of 4*l.* per centum per annum in consideration of the guarantee hereinafter contained Now these presents witness that in consideration of the premises they, the said Herbert New, Courtenay Connell Prance, and George Henry Garrard, do hereby guarantee unto the said Josiah Yeomans Robins, Frederick Charles Jewesbury, and Frederick Pace Webb the goodness and sufficiency of the aforesaid security for the said sum of 3000*l.* and the due and regular payment to them by even and equal half-yearly payments of the interest to become due thereon after the reduced rate of 4*l.* per centum per annum. And further, they do hereby also guarantee unto them, the said Josiah Yeomans Robins, Frederick Charles Jewesbury, and Frederick Pace Webb the repayment of the said principal sum of 3000*l.* with all interest due thereon at any time upon receiving two calendar months' previous notice requiring payment thereof. And the said Josiah Yeomans Robins, Frederick Charles Jewesbury, and Frederick Pace Webb do hereby agree to the terms and conditions of the aforesaid guarantee, and to accept interest upon the said sum of 3000*l.* so due to them as aforesaid after the rate of 4*l.* per centum per annum in consideration of the said Herbert New, Courtenay Connell Prance, and George Henry Garrard guaranteeing the principal and the punctual payment of the interest."

In 1880 Messrs. New, Prance & Garrard transferred the 3000*l.* and interest thereon at 4 per cent. to F. C. Jewesbury, Herbert New, and Eliza Smith, widow, the executors and trustees of the will of Henry Smith; and on this occasion a declaration was executed by the defendants Prance and Webb, and a guarantee was given by Messrs. New, Prance & Garrard in favour of the Smith trustees similar to those of January 1 and 2, 1877, in favour of the Stokes trustees.

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STIRLING J. In October, 1886, Messrs. Robins & Jewesbury retired from the Stokes trusteeship, and the plaintiff Alfred Allen Stokes and George Henry Garrard (a member of the firm of New, Prance & Garrard) were appointed trustees in their place, and the trust estate (including the 3000*l.* and interest secured as already mentioned) was duly vested in them and the defendant F. P. Webb. In the meantime Mr. Jewesbury had also retired from the Smith trusteeship, George William Penney had been appointed a trustee in his place, and Mrs. Smith had died.

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By a memorandum dated October 8, 1886, Messrs. Prance and Webb declared that the 6000*l.* belonged, as to the 3000*l.*, to Messrs. Webb, Stokes, and Garrard as trustees of the will of Hester Stokes, and as to 3000*l.* to Herbert New and George William Penney as trustees of the will of Henry Smith, the language of the document being almost identical with that of the memorandum of January 1, 1877, with the exception that the deeds were to remain in the custody and possession of the defendant Webb and the plaintiffs instead of the Gloucestershire Banking Company.

Upon the occasion of the appointment of new trustees of Hester Stokes' will, Messrs. New, Prance & Garrard again acted as solicitors for the trustees.

On December 22, 1891, Messrs. New, Prance & Garrard paid off the 3000*l.* secured to the Smith trustees. The 3000*l.* paid by them was made up of 1630*l.* borrowed by them from the defendants Thermutis Mary Valentine (then Thermutis Mary Smith, widow) and Edward Newton Kilvert, and of 1370*l.*, part of the assets of the firm. By an indenture of December 22, 1891, and made between the defendants Prance and Webb of the first part, New, Prance & Garrard of the second part, and Mrs. Valentine and Mr. Kilvert of the third part, the sum of 1630*l.*, part of the 3000*l.* of which New, Prance & Garrard treated themselves as being owners, was assigned by them to the defendants Mrs. Valentine and Mr. Kilvert, and the defendants Prance and Webb declared that they would stand possessed of the said sum of 3000*l.* so belonging to New, Prance & Garrard upon trust as to 1630*l.* and interest for Mrs. Valentine and Mr. Kilvert, and subject thereto

as to the remainder of the sum of 3000*l.* in trust for New, Prance & Garrard. The deed then proceeded: "Provided always and it is hereby agreed and declared that the said C. C. Prance and F. P. Webb shall continue and stand seised of and interested in the said messuages farms lands and hereditaments comprised in and appointed granted released and conveyed by the hereinbefore-recited indenture of mortgage and transfer and possessed of the powers of sale and other powers in the same indentures contained for the protection benefit and advantage of the parties who now are or hereafter shall be interested in the said two moieties of 3000*l.* and 3000*l.* *pari passu* and without any priority or preference other than the priority granted by the said New, Prance & Garrard to the transferees by these presents in respect of the said sum of 1630*l.* and the interest thereon over the said balance of 1370*l.* and the interest thereon."

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On November 28, 1893, Mr. Herbert New, the senior partner in the firm of New, Prance & Garrard, died. On June 22, 1894, New, Prance & Garrard were adjudicated bankrupts, and the defendant West was appointed trustee in the bankruptcy.

On July 24, 1894, the plaintiff Whitfield was appointed a trustee of the will of Hester Stokes in the place of George Henry Garrard. The persons now interested in the mortgage for 6000*l.*; which still remained vested in the defendants Prance and Webb, were (1.) the plaintiffs and the defendant Webb as trustees of the will of Hester Stokes to the extent of 3000*l.*; (2.) the defendants Mrs. Valentine and Mr. Kilvert to the extent of 1630*l.*, and the defendant West as trustee in the bankruptcy to the extent of the residue of 3000*l.* after payment of 1630*l.* The mortgage had not been realized, but it was admitted by all parties to be an insufficient security for 6000*l.*

Grosvenor Woods, Q.C., and *Eastwick*, for the Stokes trustees. The Stokes trustees are entitled to priority over Messrs. New, Prance & Garrard on three grounds: first, upon the construction of the declarations of trust of January 1, 1877, and October 8, 1886; secondly, on the ground that solicitors who have advised a breach of trust cannot claim in competition

STIRLING J. with the parties whom they have advised; thirdly, on the guarantee of January 2, 1877; and the Smith trustees, as the assignees of Messrs. New, Prance & Garrard, are in no better position than their assignors.

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As to the first point: The language of the declaration of trust points to giving the Stokes trustees priority, and the absence of the usual clause that there shall be no preference between the several contributories also tends to support this view. It is clear that a priority was intended as to the interest, and the proper inference is that the same view is to apply to the principal.

As to the second point: It was a clear breach of trust to invest the trust funds upon a contributory mortgage in the absence of an express power in that behalf: *Webb v. Jonas* (1); *In re Massingberd's Settlement* (2); and the 3000*l.* invested by the Stokes trustees upon the contributory mortgage in question was advanced upon the recommendation of Messrs. New, Prance & Garrard. This is recited in the guarantee of January 2, 1877, and is not disputed. We are, therefore, entitled to invoke the principle of equity that the Court will not allow a solicitor to take a benefit to himself to the prejudice of the trust estate in a transaction which is a breach of trust and which he himself has advised. It is true that no case can be found in which a solicitor has advised trustees to take a contributory mortgage, the solicitor himself taking the other part; but we submit that the principle above stated will prevent him from claiming in competition with the trustees.

The general principle is well settled and has been laid down in several cases: *Segrave v. Kirwan* (3); *Bulkley v. Wilford* (4); *Donaldson v. Haldane* (5); *In re Snell* (6); *In re Birt* (7); *Horan v. MacMahon*. (8)

As to the third point: The guarantee of January 2, 1877, entitles the Stokes trustees to say that Messrs. New, Prance &

(1) (1888) 39 Ch. D. 660.

(2) (1890) 63 L. T. 296.

(3) (1828) Beat. 157, 166.

(4) (1834) 8 Bli. (N.S.) 111, 143;

2 Cl. & F. 102.

(5) (1840) 7 Cl. & F. 762, 771.

(6) (1877) 6 Ch. D. 105.

(7) (1883) 22 Ch. D. 604.

(8) (1886) 17 L. R. Ir. 641.

Garrard, having guaranteed the sufficiency of the fund, can-  
not help themselves out of the fund so as to make it insufficient.  
A guarantor cannot derogate from his contract any more than  
a grantor from his grant. In point of derivation the word  
"guarantee" is the same as "grant." It may be said that  
this guarantee contains no express covenant by the solicitors  
not to take anything out of the fund; but that negative term  
will be implied from the positive where, as in this case, the  
want of it will render the contract wholly nugatory. The  
substance and not the form of the contract is to be looked at:  
*De Mattos v. Gibson* (1); *Wolverhampton and Walsall Ry.*  
*Co. v. London and North Western Ry. Co.* (2).

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The firm cannot afterwards set up a title of their own which  
will involve an express breach of their covenant as to the  
sufficiency of the security: *Piggott v. Stratton*. (3) And the  
Smith trustees take subject to all equities: *Priddy v. Rose* (4);  
*Roxburghe v. Cox* (5); *Harpham v. Shacklock*. (6)

The Statute of Limitations is no bar to the claim, because  
the plaintiffs are not suing the solicitors for negligence, but are  
asserting an equity against the claim of the solicitors, and that  
equity does not arise until they make their claim.

*Dauney*, for Webb.

*W. C. Prance*, for Prance.

*Hastings, Q.C.*, and *Badcock*, for the defendants Mrs. Valen-  
tine and Mr. Kilvert. There is nothing upon the construction  
of the documents to entitle the plaintiffs to priority, and there  
is no evidence of any express agreement that they should have  
priority.

In the declarations of trust the word "residue" means the  
arithmetical remainder after deducting 3000*l.* from 6000*l.*; and  
the use of the word "proportions" is inconsistent with the  
view that the first-mentioned sum of 3000*l.* belonged to the  
Stokes trustees, and that, subject thereto, the balance of  
the 6000*l.* belonged to New, Prance & Garrard.

Then as to the equity of the case, we do not dispute the

(1) (1859) 4 De G. & J. 276, 298.

(2) (1873) L. R. 16 Eq. 433, 440.

(3) (1859) 1 D. F. & J. 33.

(4) (1817) 3 Mer. 86.

(5) (1881) 17 Ch. D. 520.

(6) (1881) 19 Ch. D. 207.

STIRLING J. doctrine which precludes a solicitor under certain circumstances from obtaining a benefit for himself as against his client. But the benefit which the solicitor is prohibited from acquiring in such a case is a benefit taken out of the client's own property. In such a case the Court regards him as a trustee of the property so obtained. So in *Segrave v. Kirwan*. (1) The same principle is illustrated in *Bulkley v. Wilford* (2) and *Horan v. MacMahon*. (3) So, in *In re Snell* (4) a solicitor who acted for both mortgagor and mortgagee was not allowed to retain a lien upon deeds belonging to the mortgagee, there being no express contract that he should have the lien; and in *In re Birt* (5) a solicitor's right of retainer was negatived by reason of the relation in which he stood to his client under the circumstances in that case. Here the solicitors do not seek to get anything belonging to the client.

*Donaldson v. Haldane* (6) has no application to this case.

Then as to the guarantee. That did not affect the security at all. It was a mere personal contract, upon which no doubt the solicitors might have been sued. New & Co. never contracted to give up any portion of their moiety of the security if it should prove insufficient for the whole advance. We do not seek to take anything out of the security belonging to the Stokes trustees; we only claim our own moiety of the common fund. No doubt a purchaser of a chose in action takes subject to all the equities affecting it; but the document of October 8, 1886, gave both parties an equal right to call for the legal estate, and the right of the firm is now vested in our clients.

*J. R. Brooke*, for the defendant West. In the interest of the creditors I dispute the plaintiffs' right to priority. There is a distinction between equities affecting the property and those affecting the firm personally. As to that, I adopt the argument which has been addressed to the Court on behalf of the defendants Valentine and Kilvert.

In the absence of anything to shew a contrary intention, it is clear upon the documents that the parties were to rank pari

(1) Beat. 157.

(2) 8 Bli. (N.S.) 111; 2 Cl. & F. 102.

(3) 17 L. R. Ir. 641.

(4) 6 Ch. D. 105.

(5) 22 Ch. D. 604.

(6) 7 Cl. & F. 762, 771.

passu: *Baker v. Farmer*. (1) There was no guarantee by the firm to make good any deficiency in the security out of their own moiety.

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The firm are not liable as for a breach of trust, though they may be answerable to their clients in damages for negligence: *Mara v. Browne*. (2)

*Grosvenor Woods, Q.C.*, in reply. The firm were parties to a breach of trust, and they cannot be allowed to reap any advantage to themselves out of the transaction: *Blyth v. Fladgate*. (3) The investment, the declarations of trust, and the guarantee all formed part of one transaction and cannot be severed. The case is analogous to that of solicitors mixing up their own money with that of their clients. I admit that a solicitor advising a breach of trust in a case of this sort is not necessarily himself a trustee. That was the point argued in *Barnes v. Addy* (4) and *Mara v. Browne* (2); but I submit that the transaction in the present case entitles the Stokes trustees to the priority which they claim, because neither the firm nor those claiming under them can insist on taking a benefit from the transaction as against their clients.

*Cur. adv. vult.*

Nov. 17. STIRLING J. (after stating the facts). The plaintiffs' claim to priority in respect of the 3000*l.* to which they and the defendant Webb are entitled is based on three grounds: first, the memoranda of January 1, 1877, and October 8, 1886; secondly, the guarantee of January 2, 1877; and, thirdly, on considerations arising out of the fiduciary relationship which existed between New, Prance & Garrard and the Stokes trustees.

First, as to the memoranda of January 1, 1877, and October 8, 1886. It is said that these documents, when properly construed, create a priority in respect of the plaintiffs' 3000*l.* over the other portion of the total mortgage debt of 6000*l.* by reason of the use of the word "residue." It may be admitted that these documents do not contain all the clauses introduced into such

(1) (1868) L. R. 3 Ch. 537, 540.

(2) [1896] 1 Ch. 199.

(3) [1891] 1 Ch. 337.

(4) (1874) L. R. 9 Ch. 244.

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STIRLING J. instruments by the most cautious of conveyancers, and are not so explicit as the document of December 22, 1891, executed in favour of Mrs. Smith and Mr. Kilvert; but still I cannot think that the meaning of them is open to serious doubt. It is thereby declared that the 6000*l.* belongs to the following persons and in the following proportions, that is to say, the sum of 3000*l.*, part of the said principal sum of 6000*l.*, belongs to and is the property of the Stokes trustees, "and the remaining sum of 3000*l.*, the residue of the said principal sum of 6000*l.*, belongs to and is the property of" New, Prance & Garrard. "Residue" there means the arithmetical remainder after deducting 3000*l.* from 6000*l.*; and it would be entirely inconsistent with the use of the word "proportions" to read the clause as declaring that the first-mentioned 3000*l.* belonged to the Stokes trustees, and that, subject thereto, the balance of the 6000*l.* belonged to New, Prance & Garrard. The like meaning is plainly attributable to the word "residue" in the declaration of trust as regards the principal.

There may be a little more difficulty as to the meaning of the word "residue" when used with reference to the interest; but it seems to me to be used in the same sense as that already mentioned, namely, the arithmetical remainder after deducting from the amount of interest on 6000*l.* at  $4\frac{1}{8}$  per cent. the amount of interest on 3000*l.* at 4 per cent.

Secondly, as to the guarantee of January 2, 1877. That document contains a guarantee by New, Prance & Garrard of the goodness and sufficiency of the security; and it is said that, having given such a guarantee, neither they nor anyone claiming under them can put forward any demand which would result in rendering the security bad and insufficient. The answer is, that no such claim is made. The plaintiffs' security is one-half of the mortgage debt of 6000*l.* and the securities for it: to that half the defendants who claim under New, Prance & Garrard assert no title; they merely seek the benefit of the other half of the mortgage debt and securities which is not comprised in the plaintiffs' security. The guarantee does not purport to charge the plaintiffs' 3000*l.* on any property of New, Prance & Garrard; it is simply a personal contract by the firm, on



which the plaintiffs will no doubt be entitled to prove in the STIRLING J. bankruptcy, but which does not give the plaintiffs any rights against the specific property now in question.

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Thirdly. On this point the argument is that the investment of 3000*l.* on the security of December 30, 1876, was a breach of trust; that Messrs. New, Prance & Garrard advised this breach of trust; and that they and all persons claiming under them are precluded from taking any benefit to themselves from the transaction to the prejudice of the trust estate.

Unquestionably Messrs. New, Prance & Garrard advised the investment: according to the recital in the memorandum of January 2, 1877, the Stokes trustees advanced the 3000*l.* upon their recommendation. They were the legal advisers of the trustees in the matter, and as such it was their duty to see that the security was adequate in point of value and proper in point of form. That duty, in my judgment, they failed to discharge.

As regards the value, according to the rule of the Court then and now in force, there ought to have been a margin of one-third over and above the sum advanced—that is to say, as the total advance was 6000*l.*, the value of the mortgaged property ought to have been 9000*l.* Mr. Prance, indeed, in his evidence appeared to be of opinion that such a rule did not exist in 1876: if at that time his view of the law was such as he seemed desirous of having it supposed to be, one can only say that some reflection is cast upon his qualification to advise trustees on such a matter. It is not suggested that any valuation was made previously to the advance. [His Lordship considered the evidence upon this point; and continued:—]

There is no evidence to satisfy me that the mortgaged property was in 1876 or at any other time of a value at all approaching 9000*l.* In arriving at that conclusion I lay no stress on the guarantee given by Messrs. New, Prance & Garrard, which might seem to suggest the existence of doubt on the part of some one as to the value of the security. I am willing to accept Mr. Prance's explanation that the giving of it was in accordance with the common practice of the office.

The form of the security is not more satisfactory. The trust security ought to have been taken in the names of the trustees:

STIRLING J. *In re Massingberd's Settlement* (1); here the legal title was vested in two persons, one of whom was an entire stranger to the Stokes trust.

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In my opinion the investment was on both grounds a breach of trust. I also think that in omitting to advise the trustees that this was so, Messrs. New, Prance & Garrard were guilty of a neglect of duty to the Stokes trustees, their clients. For this they might be answerable in damages to their clients; but under ordinary circumstances they would not have been responsible to the cestuis que trust as for a breach of trust: see *Barnes v. Addy*. (2) It is said, however, that the law prevents them from taking any benefit from their own security to the disadvantage of their own clients, the Stokes trustees.

Undoubtedly the law imposes considerable disabilities on solicitors in their dealings with clients. Thus, if a solicitor employed to prepare a legal instrument so frames it that he obtains (even indirectly) a benefit under it, a court of equity will not permit him to retain it unless he can shew that he clearly and distinctly pointed out to the client that the advantage actually gained might result from the transaction; and this rule prevails whether the instrument was or was not designed to produce such a consequence, or whether the solicitor was or was not aware of the true legal effect of the instrument: see *Segrave v. Kirwan* (3); *Bulkley v. Wilford* (4); *Horan v. MacMahon*. (5) In such cases the solicitor is treated as trustee of any interest which he may acquire under the instrument for the persons on whom it would have devolved if the instrument had not been executed. Again, a solicitor who has obtained for value a security from his own client cannot take advantage of any unusual provisions introduced into it, unless he can establish that he gave the client such advice as would have come from an independent solicitor: see *Cockburn v. Edwards*. (6) There are also cases which shew that a solicitor will not be allowed to assert independent rights of his own in a way inconsistent with a duty undertaken to the client.

(1) 63 L. T. 296.

(2) L. R. 9 Ch. 244.

(3) Beat. 157.

(4) 8 Bl. (N.S.) 111; 2 Cl. & F. 102.

(5) 17 L. R. Ir. 641.

(6) (1881) 18 Ch. D. 449.

Thus, in *In re Birt* (1) the defendant in an administration action STIRLING J. and the legal personal representative of the testator was one of the firm of solicitors who acted for the plaintiff. After the plaintiff had obtained an order for a receiver, but before the receiver had perfected his security, the defendant received assets: it was held that he could not as against the plaintiff assert the right of retainer which he otherwise would have had.

Against these decisions there is not a word to be said; but in each of them the solicitor was claiming in some shape or form a benefit or advantage as against his client which the client never intended to confer.

The argument on behalf of the plaintiffs in the present case goes much further than any previous decision.

The transaction contemplated in 1876 was the advance of 6000*l.* in two sums of 3000*l.* each, one by the Stokes trustees, the other by their solicitors, on a security in respect of which, as it seems to me, they were to stand on a footing of equality.

The instruments by which the transaction was carried into effect are apt for the purpose and contain no unusual provisions—certainly none to the disadvantage of the trustees. The benefit acquired by the solicitors is one which was within the contemplation of all parties at the time; and nothing could be urged against the solicitors if, unfortunately, the clients had not been trustees and had not been involved in a breach of trust. Still that is not, in my opinion, a sufficient ground for declaring the solicitors to be trustees, either in whole or in part, of the 3000*l.* advanced by themselves, or of the security they bargained for on the occasion. There is no breach of duty on their part in acquiring or setting up such a security: their default lies in permitting the clients to advance money on the security which the clients actually got. For that the solicitors, as I have said, may be answerable to their clients in damages; but it does not in my judgment authorize me to declare the clients entitled to be paid out of the security in priority to those who now represent the solicitors.

[The order contained a declaration to the effect that the

(1) 22 Ch. D. 604.

STIRLING J. plaintiffs were not entitled to priority, but that the proceeds of the security were divisible in moieties; and the costs were to be added to the respective securities.]

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Solicitors: *Black & Moss, for Nevinson & Barlow, Malvern; Burton, Yeates & Hart, for Johnsons, Barclay & Rogers, Birmingham; Crowders & Vizard; M. H. Prance.*

G. A. S.

In re POWELL.
CROSLAND *v.* HOLLIDAY.

[1897 P. 1560.]

KEKEWICH
J.

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Dec. 10.

*Will—Construction—Perpetuity—Period of ascertaining Class—Gift of Income
to Children of A.*

A testator directed his trustees to pay the interest, dividends, and annual profits of a share of his personal estate unto the children of his sister, and to divide the same equally among them during their lives, and after their deaths to divide the share equally between their children. The testator's sister survived him:—

Held, that the gift of income to the children of the sister was confined to children born at the date of the testator's death, and that the gift over to the children's children was therefore valid, and not void for remoteness.

In re Wenmoth's Estate, (1887) 37 Ch. D. 266, distinguished.

ADJOURNED SUMMONS.

Alvara Powell, by his will dated October 17, 1877, gave all the residue of his personal estate to trustees upon trust to divide the interest, dividends, and annual profits thereof into three equal portions, and upon trust to pay one-third part of the interest, dividends, and annual profits of his personal estate unto the children of his sister Elizabeth Holmes, and to divide the same equally among them during their lives, and after their deaths to divide one-third part of his personal estate equally between their children; but if they should all die without leaving any children, then he directed his trustees to divide the said third part of his personal estate equally among the children of his nephew Edward Crosland, share and share alike.

The testator died on July 17, 1879.

The testator's sister Elizabeth Holmes, who was upwards of eighty years of age at the date of the testator's death, died on November 9, 1888. She had several children, one of whom had died leaving children.

This summons was taken out by the trustees of the will for the determination (inter alia) of the question whether the trust by the will declared of one-third of the testator's residuary personal estate in favour of the children of the children of

KEKEWICH the testator's sister Elizabeth Holmes was valid, or void as
J. transgressing the rule against perpetuities.

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H. Terrell, Q.C., and A. J. Chitty, for the trustees, in support of the summons, stated the case.

Dibdin, for the person appointed to represent the testator's next of kin. I contend that under this gift of income to the children of the testator's sister Elizabeth Holmes all children whenever born would be entitled to take, that the gift over is consequently void for remoteness, and that there is therefore an intestacy under which the next of kin become entitled. *Prima facie* a gift to the children of A. should include all the children whenever born; and the question is whether there is any rule of construction which can prevent the gift receiving that interpretation. No doubt there is a rule that a gift of corpus to the children of A. is to be confined to children in existence at the time of the testator's death. The artificial character of the rule is shewn by the fact that if there are no children in existence at that time, after-born children are let in. The rule is, in truth, merely a rule of convenience, the principle being, as stated in *Theobald on Wills*, 4th ed. p. 255, that the class is to be ascertained as soon as possible, in order that the beneficiaries may know what their rights are, and that the executors may distribute the fund. But that principle has no application to a gift of income, where the distribution is necessarily *de anno in annum*; and this is clearly shewn by the decision of *Chitty J.* in *In re Wenmoth's Estate* (1), where it was held that the rule whereby, under a gift of an aggregate fund to children at a certain age, children coming into existence after the time when the first child becomes entitled to receive his share are excluded from participation, did not apply to a bequest of income, because the reason for its application did not exist. The rule with which *Chitty J.* was immediately dealing in that case is as much a rule of convenience as that which applies here, and the reasoning on which his decision is founded is applicable. It is so treated by *Mr. Theobald*, who says, at p. 259, that "even as regards personalty the rules

already stated do not apply when the reason for their application does not exist. Thus, under a gift of income to grandchildren during their lives, all grandchildren whenever born will be admitted: *In re Wenmoth's Estate*." (1)

[Reference was also made to *In re Dawson* (2), as shewing that the age of Elizabeth Holmes was not material to be considered, and to *Hill v. Chapman* (3) and *In re Stone*. (4)]

Renshaw, Q.C., and *A. W. Rowden*, and *Warrington, Q.C.*, and *S. O. Buckmaster*, for other persons interested, were not called upon to argue on this point.

KEKEWICH J. The first question is whether, according to the language of the will, the gift to the children of the testator's sister Elizabeth Holmes must be confined to those living at the date of the death of the testator, or be construed so as to admit any children who may be born after that date. The argument in favour of the more extensive construction, admitting the after-born children, is, I think, founded entirely on an application, which I venture to call a misapplication, of the decision of Chitty J. in *In re Wenmoth's Estate*. (1) It is said that the learned judge was there dealing with the same rule of convenience as that which applies to the present case, and that the exception to the application of the rule which was adopted by him is applicable to this case also. The answer, to my mind, is clear. Whether the rule which I am asked to apply can or cannot be properly described as a rule of convenience, it is not the rule of convenience with which Chitty J. was dealing. There is some foundation for the argument, and for calling the rule a rule of convenience. Mr. Theobald, a well-known and careful author, in his book on Wills has described both the rule which I have to apply here and the rule with which Chitty J. was dealing as rules of convenience. With great respect to Mr. Theobald's accuracy, I venture to think that the law is better stated in Mr. Vaughan Hawkins' treatise. He devotes Chapter VII. to "Children, &c., when ascertained," and on page 68 he says this: "It might be

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(1) 37 Ch. D. 266.

(2) (1888) 39 Ch. D. 155.

(3) (1791) 1 Ves. 405.

(4) [1895] 2 Ch. 196.

KEKEWICH supposed that a gift to the children of a person simpliciter, J. would include all the children he might have, whenever coming into existence; but the testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible; and it may be laid down as a general rule (qualified by the other rules which follow in this chapter) that"—and then he thus states the rule: "A devise or bequest to the children of A. or of the testator, means, *primâ facie*, the children *in existence at the testator's death*: provided there are such children then in existence." He cites *Viner v. Francis* (1), a case which is also cited by Mr. Theobald, 4th ed. p. 255. It is over a hundred years old, and there can be no question about the authority of it. Mr. Hawkins on a somewhat later page also deals in a similar way with the rule with which Chitty J. dealt in *In re Wenmoth's Estate*. (2) At page 75 he says: "In the cases considered under the preceding rule, the shares of all the objects became payable at the same time, and the period of distribution was the same for them all: where the shares become payable at different times, as in the ordinary case of a gift to children at twenty-one or marriage, the last rule requires to be supplemented by another, namely, that where there is a bequest of an aggregate fund to children as a class, and the *share of each* child is made payable on attaining a given age, or marriage, the period of distribution is the time when the *first* child becomes entitled to receive his share, and children coming into existence after that period are excluded." This rule, which accelerates the period of distribution by fixing it at the time when the first child becomes entitled to receive his share, is undoubtedly a rule of convenience. The two rules, however, seem to me to depend on different considerations. The latter is purely a rule of convenience, which, as is admitted by all who have commented on it, contradicts the words of the will. The other rule does not necessarily contradict the words of the will, because, in legal phraseology, "all the children" is intended to mean "all the children living at the testator's death." No lawyer could doubt that a gift of a sum of money to the "members of a club" would extend only to those who

fulfilled that description at the time of the testator's death. KEKEWICH J.
 There does, therefore, seem to me to be a distinction of substance between the first rule, which may to some extent be a rule of convenience, and the second rule, which is purely and simply a rule of convenience, although, no doubt, they must both be treated as instances of rules fixing the period of distribution in the case of gifts to a class of persons. Chitty J., in *In re Wenmoth's Estate* (1), was dealing solely with the second rule, i.e. the rule which fixes the period of distribution among children at the time when the first child becomes entitled. It is that rule which he declines to extend to a case where income only is given; and I do not think it occurred to him to consider in any way whether it would be right to depart from the rule as to children being ascertained at the testator's death because they were only interested in income, or for any other reason. His judgment does not appear to me to apply to such a case as the present one, and this gift must be construed according to the ordinary rule. I therefore hold that, under the gift of income, only the children of Elizabeth Holmes living at the testator's death take, and that the gift over to the children of such children is not void for remoteness, and there must be a declaration to that effect.

Solicitors : *Pitman & Sons ; E. Bevir ; Peacock & Goddard.*

(1) 37 Ch. D. 266.

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In re TOMLINSON.
TOMLINSON *v.* ANDREW.

[1897 T. 914.]

*Will—Leaseholds—Tenant for Life—Remainderman—Covenants—Rent—
Repairs—Liability.*

A testator who died possessed of a leasehold house held by him on a repairing lease bequeathed it directly (without the intervention of trustees) to his niece for life, and after her death to other persons absolutely, and appointed executors:—

Held, that the niece, the tenant for life, was not bound to perform any of the covenants in the lease.

In re Courtier, (1886) 34 Ch. D. 136, *In re Baring*, [1893] 1 Ch. 61, and *In re Redding*, [1897] 1 Ch. 876, discussed.

CHARLES TOMLINSON, of No. 7, North Road, Highgate, who died on February 15, 1891, by his will dated January 19, 1891, made the following bequest: "I bequeath to my niece Mary Tomlinson the house in which we now reside, No. 7, North Road, together with the furniture, books, plate, pictures, &c., therein contained, for the term of her natural life, and after her death to go to George Andrew and his wife, my niece Mary Andrew, for their benefit and that of their family of children." And he appointed his niece Mary Tomlinson and his nephew George Andrew his executors and residuary legatees.

The house No. 7, North Road, was held by the testator under a lease dated December 28, 1867, whereby, in consideration of a sum of 500*l.*, the house was demised by the lessor to the testator for a term of ninety years from December 25, 1867, at the yearly rent of 10*l.*, the lessee covenanting to pay rent and taxes, to insure, paint and keep in good repair throughout the term.

This was an originating summons taken out by the testator's niece Mary Tomlinson, the tenant for life of the house, against the remaindermen, George Andrew, his wife and children, for the determination of, among other questions on the will, the question whether the plaintiff was liable to pay and perform

the rent and covenants contained in the lease of the house KEKEWICH J.
No. 7, North Road, or by whom the same ought to be paid and
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W. M. Cann, for the plaintiff. Upon the authorities, the tenant for life is not liable for the rent or repairs of this leasehold house: *In re Courtier* (1) and *In re Baring* (2), the latter being your Lordship's own decision. In the subsequent case of *In re Redding* (3) Stirling J. apparently disagreed with your Lordship; but that was a case purely of construction, whether "income derived" meant the net income after deducting outgoings; and therefore I ask your Lordship to disregard that case and follow your own decision, and say that this tenant for life is entitled to enjoy this leasehold property without any liability, as between herself and the remaindermen, either to pay rent or expend money in repairs under the covenants.

H. Terrell, Q.C., and *P. S. Oswald*, for the defendants George and Mary Andrew. Our contention is that the plaintiff should pay the rent and perform the covenants. The cases cited do not apply to the present case, for they are all cases of trusts, the leaseholds being bequeathed in the first instance to trustees, whereas here there is a specific gift of the legal estate directly to the tenant for life. If the tenant for life is not to perform the covenants, who is? She is the legal tenant for life in possession, and there are no trustees having a fund to be expended in rent and repairs, nor have the executors any right to go upon the property to do repairs.

[KEKEWICH J. referred to *In re Hotchkys*. (4)]

There again the property was bequeathed to trustees. It was long ago laid down that a specific legatee of leaseholds who takes the benefit of the bequest must, as between himself and the executor, also bear the burden: *Hickling v. Boyer*. (5)

Rowden and Pattisson, for other parties.

KEKEWICH J. The argument on behalf of the respondents has turned mainly upon the distinction between this case and

(1) 34 Ch. D. 136.

(3) [1897] 1 Ch. 876.

(2) [1893] 1 Ch. 61.

(4) (1886) 32 Ch. D. 408.

(5) (1851) 3 Mac. & G. 635, 645.

KEKEWICH J. the three cases cited of *In re Courtier* (1), before the Court of Appeal, *In re Baring* (2), before myself, and *In re Redding* (3), before Stirling J., the distinction being stated to be that here there is a direct gift of the leasehold property to the tenant for life, whereas in each of those three cases the gift was in the first instance to trustees. In each of those cases the tenant for life held only an equitable estate, and had possession by permission of the trustees, the legal owners. It is said that here the case is different, because there is in terms a direct gift to this lady, and that this must mean that she is to take cum onere, and all the more so because there are no trustees, no persons to intervene, no persons who have the legal estate vested in them so as to enable them to discharge the legal covenants in the lease. There seems to me to be a fallacy in that argument. The answer to it, in my opinion, is that this being a lease of the testator's he was liable to perform the covenants in it, whether for payment of rent, or to keep in repair, and that, although these covenants cannot be enforced until the liability occurs, still there is a burden on the testator's estate, and his executors are bound in law to discharge that liability, and not only to discharge it but to see that the estate is not distributed without providing for it. If the executors plead plene administravit, then the remedy is against the legatees; but in the meantime the executors are liable on these covenants. If so, surely there is no substance in the argument that they cannot go upon the property to make the necessary repairs. It appears to me that although they have assented to the bequest, still they are entitled to say to the tenant for life, "This liability rests upon us, and we must see that, not only as between us and you, but as between you and the remaindermen, it is discharged, and we insist upon being allowed to come on the property and do, or see that you do, that which the testator's estate is liable for." In my opinion, the argument, though plausible at first sight, is not sufficient to distinguish this case from the three cases that have been cited.

That being so, the question is whether I ought to follow the interpretation which I adopted in *In re Baring* (2) of the deci-

(1) 34 Ch. D. 136. (2) [1893] 1 Ch. 61. (3) [1897] 1 Ch. 876.

sion of the Court of Appeal in *In re Courtier*. (1) In *In re KEKEWICH J.*
Baring (2) I intended to follow *In re Courtier*. (1) In *In re*
Redding (3) Stirling J., though not differing from my opinion
 in *In re Baring* (2), for he said it was supported by the language
 of the will, thought I took a wrong view of the decision of the
 Court of Appeal in *In re Courtier*. (1) It is unnecessary for
 me to say that Stirling J. is more likely to be right as to that
 than I am; but I have had an opportunity of reading his
 remarks in *In re Redding* (3) upon that decision, and I must
 express my opinion that though he may be right in his view,
 he is not so conclusively right that I ought to depart from what
 I said of *In re Courtier* (1) in *In re Baring*. (2) What Stir-
 ling J. says is this (4): "*In re Courtier* (1) . . . was exclu-
 sively directed to the question whether the tenant for life was
 bound to discharge the liabilities in respect of repairs to prop-
 erty which had accrued at the death of the testator. The
 decision of the Court of Appeal was given with reference to
 that and nothing else, for it seems to me that when the judg-
 ments are looked at that was the sole question which the
 judges of the Court of Appeal dealt with."

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I have read the judgments of the Court of Appeal again, and I think I see what Stirling J. means, and there is a good deal to justify the conclusion at which he arrived; but with great respect I do not think the judgments will bear the narrow interpretation he put upon them. Cotton L.J., says (5): "The widow has kept them"—the leaseholds—"in the same state as they were in at the testator's death, but declines to put them in such a state of repair as to satisfy the covenants in the leases." He does not say that the widow, by keeping the leaseholds in the state of repair in which they were at the testator's death, had satisfied the covenants in the leases up to that time. What he says is that, although the widow had kept them in the state of repair in which they were at the testator's death, the question was whether she was "bound to spend her money in putting them into sufficient repair to satisfy the covenants in the leases," and he held that she was not bound to

(1) 34 Ch. D. 136.

(3) [1897] 1 Ch. 876.

(2) [1893] 1 Ch. 61.

(4) *Ibid.* 879.

(5) 34 Ch. D. 139.

KEKEWICH J. make good the deficiencies of the testator. It appears to me, without going through the judgments sentence by sentence, that what the other Lords Justices say is consistent with that view. I may observe that Cotton L.J. says distinctly (1), "There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits." And that is prefaced by the statement that "She is not bound to the landlords under the covenants." There are passages in the other judgments delivered by Bowen and Fry L.JJ. which, though dealing with the state of things at the testator's death, do not necessarily point to the liability of the tenant for life as regards only the state of repair existing at the testator's death, but deal with the question as to the general liability to repair under the covenants. In my opinion the essence of the decision is this—not that the tenant for life is not bound to do what is necessary to keep the property in the state of repair in which it was at the testator's death, but that he is not bound to do anything at all under the covenants in the lease. That seems to me to cast upon the testator's estate this liability, namely—as was pointed out in *In re Hotchkys* (2)—to do the necessary repairs upon such terms as will bear fairly upon both the tenant for life and the remaindermen. I think I am bound to adhere to the view that I took in *In re Baring* (3) of the decision in *In re Courtier* (4), and to decide this case upon the question of general liability under the covenants in the lease.

It is said that the earlier case of *Hickling v. Boyer* (5) applies to the present. I do not intend to discuss that case, because, if it is inconsistent with *In re Courtier* (4), I am bound to follow the later decision, a decision of the Court of Appeal in modern times. In my opinion I must take the decision in *In re Courtier* (4) as my guide in the present case; and therefore I hold that this lady, the tenant for life, is not bound to perform the covenants in the lease, either for payment of rent, or to repair, or otherwise.

Solicitors: *C. Sawbridge & Son.*

(1) 34 Ch. D. 139.

(3) [1893] 1 Ch. 61.

(2) 32 Ch. D. 408.

(4) 34 Ch. D. 136.

(5) 3 Mac. & G. 635.

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In re ROLLASON'S REGISTERED DESIGN.

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July 14.

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Nov. 24, 25, 27.

Design—Applicable for Pattern—Coffin-plates—Drawing furnished to Comptroller—Registration of Design—“New or Original”—Novel Combination of old Designs—Marking Goods—Statutory Requirements—“All proper Steps”—Motion to Expunge—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 47, 51, 60—Designs Rules, 1890, rr. 8, 9.

It is not necessary for a person who registers a design under Part III. of the Patents, Designs, and Trade Marks Act, 1883, to describe on his application by means of cross-sections or otherwise how the article, for the pattern of which the design is applicable, is to be carried out in manufacture, and it is immaterial whether or not the design can be so carried out in more ways than one.

Although the word “ornament,” which is used in s. 60 of the Act of 1883, is not used in rule 9 of the Designs Rules, 1890, “pattern” in that rule must for the purposes of that rule be taken to include it.

Under the Patents, Designs, and Trade Marks Act, 1883, Part III., R., in May, 1894, registered a design for metallic coffin-plates. Upon his application, he furnished to the comptroller, under rule 8 of the Designs Rules, 1890, a drawing of his design, and stated, under rule 9, that the design was applicable for “patterns.”

The drawing shewed a set of irregular four-sided coffin plates, with leaf-shaped projections at the corners, each of which contained a shell-pattern ornamentation with double lines or rims running round the inner edges of the plate and enclosing the centre of it, and also double lines enclosing the shells; and in the view taken by the Court of Appeal the drawing indicated that the plate had a sunk centre. S. had previously registered a design of a somewhat similar character, with shells at the corners, but without the inner double lines or rims enclosing the centre and the shells; and in the view taken by the Court of Appeal his drawing indicated a flat centre. R. contended that although parts of his design might be old, the combination of the old parts with the sunken centre and raised rims was new and original.

Upon a motion to remove R.'s design from the register for want of novelty, and for omission properly to mark his goods, it was held by the Court of Appeal—(1.), reversing the decision of Kekewich J., that the word “patterns” in the application must be taken to include shape, ornamentation, and outline; and that, having regard to the purpose for which the pattern was designed, there was sufficient indication in R.'s drawing of a sunk centre or raised edges to his coffin-plate to make his design novel and original, and to entitle it to remain on the register; and (2.), affirming the decision of Kekewich J., that R. had taken all proper steps to ensure the marking of his goods.

Per Vaughan Williams L.J.: The Act of 1883 draws such a distinction between “pattern” and “shape” that when an applicant in applying for the registration of a design chooses to base his application upon “pattern,” then, in dealing with the question of originality or novelty, the right to

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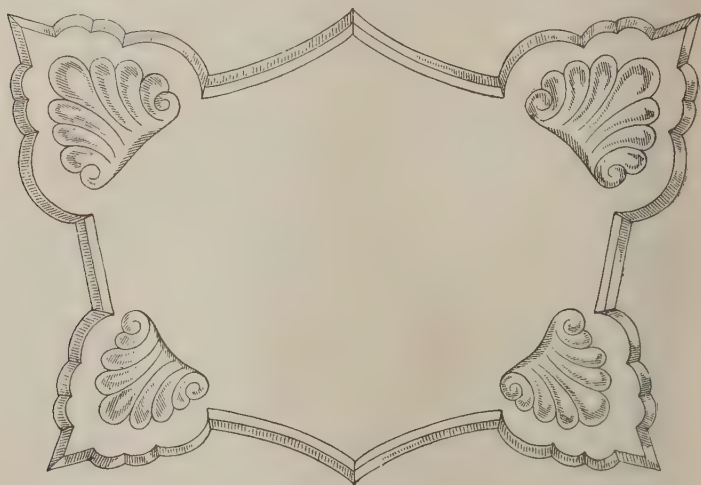
registration should be limited to matters falling within the meaning of the word "pattern" as used in the application. If the design furnished on an application is limited to "pattern," novelty or originality cannot be found in anything which is "shape," as distinguished from pattern; and vice versâ. And if the result of the registered design is to leave in ambiguity whether a particular matter is included in it or not, the inclination of the Court ought to be against the applicant, whose duty it is to make clear what the design is which he desires to appropriate to the exclusion of the public.

Le May v. Welch, (1884) 28 Ch. D. 24, approved.

APPEAL from Kekewich J.

In May, 1892, a firm called Sanders, Son & Payne, registered

DRAWING FURNISHED BY SANDERS, SON & PAYNE.



a design (No. 192,339) for the handle-plate of a coffin; and the drawing given above is a reduced reproduction of that furnished to the comptroller by them upon their application for such registration.

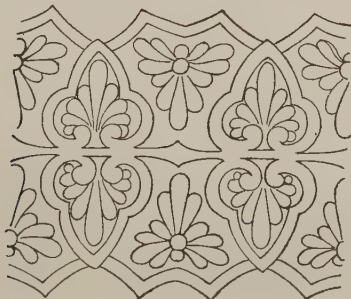
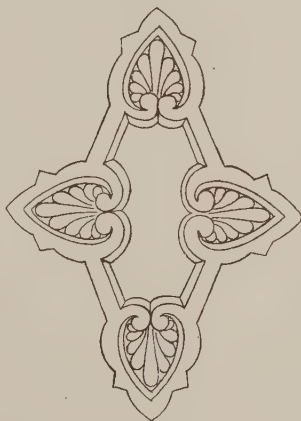
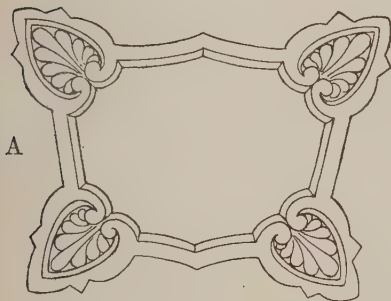
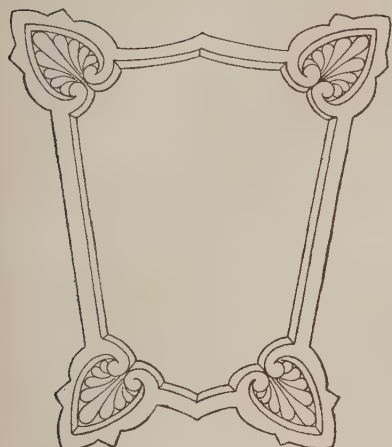
On May 28, 1894, Charles Rollason registered a design (No. 232,908) in respect of a set of six articles of coffin furniture in Class 1 of Sched. III. to the Designs Rules, 1890. At the time of his application he stated in accordance with rule 9 that the design was registered as "applicable for the patterns"; and the drawing given on the opposite page is a reduced repro-

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1897 his application for registration of his design.

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The breast-plates and handle-plates purporting to be made by Charles Rollason in accordance with this design were so constructed that the central portion of each article was sunk below the level of the border or moulding which surrounded it. And the particular plate in question in these proceedings was that marked A on the reduced reproduction of Rollason's drawing.

In April, 1897, Rollason commenced an action in the Birmingham County Court against the firm of Samuel Heath & Sons, Limited, of Birmingham, in order to restrain an alleged infringement of his registered design (No. 232,908); and on May 31, 1897, Messrs. Heath & Sons gave Rollason notice of motion for rectification of the Register of Designs by removing therefrom his design, upon the grounds that it was not a new and original design at the date of the registration thereof, and, further, that he, Rollason, had delivered on sale articles to which the said registered design had been applied, and having on them words or figures other than those under or in connection with which the said design had been registered.

The motion was heard before Kekewich J. on July 14, 1897, and in support of it Messrs. Heath & Sons produced evidence to shew that the design registered by Rollason on May 28, 1894, was not "new or original" at the date of registration, and had been anticipated by (amongst others) that registered by Messrs. Sanders in May, 1892; and also that Rollason had failed to comply with s. 51 of the Act of 1883, inasmuch as he had marked some of the goods purporting to be made in accordance with his design with a wrong number, and in particular had marked certain hand-plates with the number 252,908, instead of the number 232,908. Rollason, in his evidence in opposition to the motion, claimed novelty for his design, on the ground that it combined in a new and original manner several characteristics of earlier designs—namely, the outline of one, the sunk centres and raised moulding of another, and the raised shell design of a third, with other additions and modifications, and produced evidence to shew that the wrong

marking of the hand-plate was a mistake on the part of one of his die-sinker's workmen, which was rectified as soon as it was discovered.

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Renshaw, Q.C., and *W. N. Lawson*, in support of the motion.

Warrington, Q.C., and *E. P. Hewitt*, for the respondent, contra.

Renshaw, Q.C., in reply.

KEKEWICH J. held that Rollason had taken all reasonable steps to ensure the proper marking of the article, and had brought himself within the exception to s. 51 of the Act of 1883; but that the design was bad for want of novelty, and must be removed from the register.

Rollason appealed. The appeal came on for hearing on November 24, 1897.

Warrington, Q.C., and *E. P. Hewitt*, for the appellant. The learned judge has held that the appellant had taken all proper steps to ensure the marking of the articles made according to his design with the registered number, but has decided that the design must be removed from the register for want of novelty. Now certain portions of the design may not be novel, but the combination of the sunken centre with the raised rims round it and other accessories and details are entirely new; and the design is substantially different to any previously published design applicable to this class of goods, and satisfies the requirements of s. 47 of the Act of 1883. It is a combination which forms a new and original design within the decisions in *Harrison v. Taylor* (1) and *Walker, Hunter & Co. v. Falkirk Iron Co.* (2)

[LINDLEY M.R. referred to *In re Clarke's Design.* (3)]

In that case the design registered was for the shape of the shade of an electric lamp. There was no novelty or originality in it at all as applied to sources of light, and the Court held that the application of an old-shaped shade to an electric light, with the mere omission of a chimney which was used for gas

(1) (1859) 4 H. & N. 815. (2) (1887) 4 Rep. Pat. Cas. 390.

(3) [1896] 2 Ch. 38.

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and would be useless for electric light, could not be protected. But this is quite a different case. It is suggested that we might have supplemented our drawing with cross-sections, or with exact representations or specimens of the coffin-plates themselves; but what we have done was a full compliance with the terms of the Act and the Rules; and we have never been asked to do anything more. It is not necessary that the drawing furnished should shew the different levels, if any. But as a matter of fact our drawing does shew the different levels. Moreover, rule 9 provides that "when the articles to which designs are applied are not of a kind which can be pasted into books, drawings photographs or tracings of such designs shall be furnished": Edmunds on Designs, pp. 177, 265. It is said again that the registration is bad because the drawing which we furnished was not itself sufficiently exact. But the design was registered as applicable for the "pattern" of a particular article—namely, coffin-plates; and there is nothing in the Act which lays down that the design must be described with the exactness required in a specification, nor that it must be so described as to shew how it is intended to be used, or how the design is to be carried out.

With regard to anticipation, Sanders' drawing is no anticipation in any way of our design. His idea, and the effect of it, is different. His design merely represents a flat plate; ours is a new and original combination of several elements never before brought together—of outline, depressed centre, raised moulding, and raised shell, with other details which at once strike the eye; and it is accordingly a perfectly good design. As to the slight accidental mistake in the marks, it was rectified as soon as it was discovered.

Renshaw, Q.C., and *W. N. Lawson*, for the respondents Messrs. Heath & Co. It is impossible to ascertain from the design which the appellant has registered for what he has obtained, or claims protection. It is said that the raised margin forms the characteristic difference; but the design does not shew whether the centre is raised, depressed, or flat; and it might be carried out in many ways, and with many different cross-sections. The whole thing is shape, and the impressed

shell: for neither of which he is entitled to protection. To entitle a design to protection, when registered as applicable to pattern, it must be something different from mere shape and configuration, and the drawing ought to be so distinct as not to include at the option of the person who registers it all these possible varieties. Under s. 48 the drawing must be sufficient to enable the comptroller to identify the design; but the opinion of the comptroller is not conclusive upon the question whether or not the drawing does identify it. The appellant must admit that he cannot claim protection either for the outline or the shells, and he cannot claim anything whatever as new which he has indicated in his drawing.

It would have been perfectly easy for the appellant to have furnished, under the alternative clause in s. 48, sub-s. 1, exact representations or specimens of his design shewing that he claimed, as he now asserts he does, the shape of a depression in the centre of each plate. He might, again, have registered both "pattern" and "shape." But he has chosen to register for "pattern" only, and to give no cross-sections, and no indication of any depression or difference in level. We say first that no design has been registered which can be called "new or original." And secondly, that the appellant's design was anticipated by the design registered by Sanders in May, 1892. According to Baggallay L.J., in *Le May v. Welch* (1), "in order to justify the registration of a design . . . there must, according to my view of the case, be some clearly marked and defined difference between that which is to be registered as a new design, and that which has gone before." Applying that test, there is no substantial novelty at all: *In re Clarke's Design* (2); *In re Sherwood's Design*. (3)

Upon the last point, wrong stamping is an absolute bar: if the proprietor of a design fails to mark each article with the prescribed mark, then, according to s. 51 of the Act of 1883, the copyright in the design ceases, unless he can shew that he took all proper steps to ensure the marking of the article. And the evidence here shews that the proprietor was, for months,

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(1) 28 Ch. D. 24, 33.

(2) [1896] 2 Ch. 38; 13 Rep. Pat. Cas. 351.

(3) (1892) 9 Rep. Pat. Cas. 268.

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making and selling large numbers of these plates without taking the necessary steps to see that they were properly marked.

[They also referred to *Johnson v. Bailey* (1) and *Harrison v. Taylor*. (2)]

Warrington, Q.C., in reply. It is an important part of our case that we registered our design as applicable to "patterns" only. And we were right in so doing, for if we had registered it for shape, we should have been told we were claiming too much, and there might have been risk: *John Harper & Co., Limited v. Wright & Butler, &c., Limited*. (3) The purpose for which the drawing is furnished is identification only—not to enable persons to use the drawing or construct anything from it. It is entirely different to the case of a specification for a patent.

Cur. adv. vult.

Nov. 27. LINDLEY M.R. This is an appeal raising the question whether a certain registered design ought to be taken off the Register of Designs. The learned judge in the Court below has held that it is not a new or original design, and he has ordered it to be taken off the register.

The first question to consider is what is the design. Until you get hold of that you can do nothing with the case. As was pointed out in *In re Clarke's Design* (4), this Act of Parliament has nothing to do with designs in the abstract. What it has to do with is designs intended to be applied to some article or other. It may be to the whole article, or it may be to be put on to some other article; but, unless you know what the design is for, you are discussing an abstract question which never arises under the Act of Parliament.

This design was for coffin-plates. It is contained in the drawing which is registered with the comptroller at the Patent Office. I shall not attempt to describe it; it is more or less a four-sided figure with what are called shell patterns in the corners, and certain lines which are shewn upon the drawing.

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| (1) (1893) 11 Rep. Pat. Cas. | (3) [1896] 1 Ch. 142. |
| 21. | (4) [1896] 2 Ch. 38; 13 Rep. Pat. |
| (2) 4 H. & N. 815. | Cas. 351. |

That registered drawing is the design, and nothing else. It is no part of this Act of Parliament that the person registering a design should say and describe minutely, or at all, how the article is to be made, or how the design is to be carried out; and it appears to me immaterial in considering this Act of Parliament whether a design can be copied in more ways than one or not. There may be, for anything I know, various methods of producing a coffin-plate of this particular design and this particular pattern, and I think the evidence has shewn that there are a good many ways of copying it. I refer to that because a great point was made of the fact that you could make a thing of this design with a great number of cross-sections; and, as cross-sections were not shewn, the design is criticised, and it is said it is an insufficient design. To my mind, that is a false point altogether. We have nothing to do with cross-sections; we have nothing to do with the mode in which you are making the pattern: that has nothing to do with it at all. The thing is the pattern—the design which is shewn here—and nothing else.

Having got at that design, and bearing in mind that it is not a design in the abstract, but a design for coffin-plates, the simple question and the whole question is whether it is new or original. With reference to that a good deal might turn, and I think perhaps does turn, upon the question whether those parallel lines with the little transverse lines at the angles do or do not shew that the middle is to be on a lower plane than the edges—whether you call it a plate with a depressed middle, or whether you call it a plate with a raised edge, is of no consequence. Mr. Skerrett, a patent agent, who gave evidence on behalf of Messrs. Heath & Sons, says that you cannot infer that from the drawing. I have looked at his evidence with some care with reference to that particular point, and I cannot see that Skerrett considered anything more than the drawing apart from the purpose for which it was to be used—apart from the thing to which it was to be applied. I doubt very much whether Skerrett, if he had been asked whether it is capable of all these cross-sections, bearing in mind what it is for, would have said that. All that he said was, that if you look at the

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drawing alone, without reference to the thing it is applied to, you may make that design in all those sections. I have no doubt that it is so. If we do look at the matter, as I think we ought, with reference to a coffin-plate, it does strike me, I confess, that an ordinary person would consider that that was a design for a plate with a depressed centre or a raised edge. I think he would. I do not attach much importance to that; but I am inclined to go a step further and say, even if the design can be copied in coffin-plates in the great variety of ways that Skerrett says it can be, we must come back to the question whether it is new or original or not.

If we take it that this design is for a coffin-plate with a sunk centre or raised edges, the case is comparatively easy; because I think, from that point of view, it is certainly not anticipated by the design registered by Messrs. Sanders, which has no depressed centre at all. But if that is not the true view, and if we are to apply Skerrett's reasoning to the design and say that you can copy this in a great variety of ways, still, it appears to me, it is not anticipated by that thing that was used before; that is to say, there is sufficient difference between this pattern and the pattern of Messrs. Sanders to make this a new and original design. This, of course, is a question upon which opinions may differ, and I am quite alive to the danger of upholding designs which do not substantially vary from previous designs. The principle on which the Court acted in *Le May v. Welch* (1), and again in *In re Clarke's Design* (2), is perfectly sound, and I do not think it is right to give a monopoly to a person who uses an old design with a trivial variation, which he lays hold of and calls a new design. You must look at it and see whether it is substantially a new pattern. I think, even if you throw over the depressed centre, that this is on the safe side of the line, and that this cannot be said to be a pattern which is not new and original.

With reference to the word "pattern," I cannot help thinking that in a case of this kind the pattern includes the shape and ornamentation. The word "ornament" is dropped out of the rule, although it is in s. 60 of the Act; but when you talk of

(1) 28 Ch. D. 24, 33.

(2) [1896] 2 Ch. 38; 13 Rep. Pat. Cas. 351.

the pattern of a thing like this, I do not see that it is necessary or even proper to leave out the outline. Of course, it is not for shape alone. It is, to my mind, for shape plus ornamentation in a case like this. I think, therefore, when we look at this design carefully and narrowly, as we ought when we are dealing with monopolies, that there is sufficient novelty and originality in this design—in the registered pattern—to entitle Mr. Rollason to have it retained on the register, where it has been ever since 1894; and I think, therefore, the appeal must be allowed.

Then there is the other point about the 51st section. It turns upon a mistake which was made by the die-sinker in putting a 5 for a 3. The 51st section runs thus, and it is rather important: "Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered." That, as applied to this case, means "Registered" or "Rd." with the number "232,908." That is according to the rules what he ought to have had on; but in one plate made for a child's coffin the die-sinker inadvertently put a 5 for a 3, and it was not found out. Now, if the section stopped where I have stopped, it appears to me it would have rendered this design a bad design. It would have had to be expunged. But the Legislature saw that that would be a very serious consequence of what might be a very trifling and venial slip; so the section goes on to qualify what I have read in this way: "If he fails to do so"—which in that particular instance Rollason did—"the copyright in the design shall cease, unless the proprietor shews that he took all proper steps to ensure the marking of the article."

The learned judge in the Court below thought that Rollason had brought himself within the last part of that section. I think so too, and I think so for this reason. It is not as if the error was one which would catch the eye even of a casual observer: the error here was a mistake in putting a 5 for a 3, and when you look at the impression on the plate it is very difficult to find out whether there has been a mistake or not,

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and, in point of fact, this mistake was not found out for a long time—I think a year or two—and as soon as it was pointed out it was rectified. Having heard Rollason's evidence about this, I do not think myself that he was in any way really to blame for not finding out that blunder before. It is very difficult to see it now, although we all can see it when it is pointed out. But this thing has passed muster for years, never catching the eye of anyone. Rollason's instructions to the die-sinker were quite right. He gave him the proper number and he did not observe the mistake made by the workman. The mistake was made in one plate only out of a great many, and it was corrected as soon as it was discovered. I think it would be very lamentable if we were to hold that s. 51 did not cure a defect by an unintentional slip such as that.

CHITTY L.J. The principal question is whether Rollason's design as registered is a new or original design. I take it that there may be a distinction, and, as the Act has used two different words, there is some distinction between "new" and "original." It might be shewn in this way. Every design which is original is new, but every design which is new is not necessarily original. Rollason's design as registered is for "pattern," and there is a distinction drawn in the 60th section and in the Rules in respect of pattern and shape or configuration. It may not always be easy to say under which class a particular design ranges itself, whether for pattern, or for shape, or configuration, or for ornament; and, indeed, the 60th section shews that the same design may be registered for any two or more of such purposes. The distinction between pattern and shape is not necessarily scientific and precise. The Act relates to matter concerning trade and manufacture, and the language used is quite sufficient for that purpose. The practical distinction is shewn by such a common illustration as that which I will give: "I like the shape of your coat, but I think that the pattern of the materials is in execrable taste."

This design is registered for pattern, and it consists of a drawing, on paper (necessarily flat), which I have before me. It is unnecessary to describe it at length; but to my eye—and

I think, on a question of novelty, the eye ultimately has to decide, regard, of course, being had to the evidence given on the subject—to my eye this design has a raised margin or framework, and there is a depression in the centre. I agree with what the Master of the Rolls has said, that that is not necessarily the critical question; but still I express my opinion that these little cross lines running from the interior parallel lines are sufficient to denote that the surface was either raised or depressed—to denote to the eye of an ordinary person looking at it with a view to understanding it, not with a view to misunderstanding it. On this part of the case I think it is material to consider the purpose for which the pattern was designed—that it is to be placed as a plate upon coffins, and to raise the centre would be to put the pattern on to the coffin in a manner in which I am satisfied no person of skill intending really to work at the pattern legitimately would think of doing. The centre would be depressed so as to lie flat upon the surface, whatever it may be, of the coffin.

I agree with the Master of the Rolls in what he has said with reference to the general effect of this statute; and it seems to me that if we look at this design of Rollason's, which I have now before me, as it stands, and compare it with Sanders', there is sufficient material and substantial difference between the two to justify us in holding that Rollason's design is new. It is for pattern, I repeat, that this design is registered, and I can see sufficient material differences between the two drawings which I have before me—Rollason's and Sanders'—as to bring me to the conclusion that Sanders' is not an anticipation. There are very few designs which are entirely new. Hardly any could be produced. They are made up from the old, and several exhibits have been put before us to shew what the old were. It is acknowledged, in the argument for Rollason, that his is made up of several old designs which he has combined together. The result of the combination may be to make a novel design; and I think in this case there is sufficient material for us to decide that these old things in combination present to the eye a new design.

I express my entire concurrence in the principle of the

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decision in *Le May v. Welch* (1), and I think that this Act of Parliament ought to be construed so as not to become oppressive to the public in general, and that a man is not by slight alterations of old designs to exclude the rest of Her Majesty's subjects from making what he is pleased to call his new design. The differences must be substantial; and slight alterations in such an article of common use as a shirt collar are insufficient to entitle a person such as *Le May* was, to say that his design was new. I think the result of the combination here is to produce a novel design.

A point was argued for the respondents on the appeal, in reference to Rollason's design, that it did not shew a bevelling off on the edges. That, I think, is not only a trivial point, but I think the argument has no application to such a case as this. The design does not include the bevelling. That seems to me to be the answer. If you registered a new design as a pattern, say for a panel, you would only shew so much of your new design as you claimed to be new. You would not shew any parts which were unnecessary to be shewn for the purpose of your design which may or may not be added. In my opinion, therefore, this registration ought to stand.

With regard to the argument on the 51st section, I have nothing to add to that which has fallen from the Master of the Rolls. I think Kekewich J. was quite right on that point.

VAUGHAN WILLIAMS L.J. I also agree that Kekewich J. was perfectly right as to the point raised on the 51st section, and I have nothing to add to what the other members of the Court have said upon that point.

But, with regard to the other point in the case, I do desire to make some observations, because I am not quite sure that I agree with the other members of the Court as to the principle upon which one ought to determine the question of the novelty or originality of the design in question. This Act of Parliament confers upon those persons who have invented, or have come into possession of, a new or original design, certain rights, in the nature of copyright, if they, pursuant to the Act of

Parliament, register the design. Now, the Act 46 & 47 Vict. c. 57, deals with the registration of designs in Part III. In s. 47, which is the first material section, it is said that "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of this Act." From that section it appears that a design, in order that it can be registered under it, must be a new or original design. Then the definition clause, which is s. 60, provides that "'Design' means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable." The result, to my mind, of that section is this—that the Legislature intended to draw a distinction between "pattern," that is 1; shape or configuration, that is 2; and ornament, that is 3. That being so, I should (quite apart from the Rules) have thought that the Legislature intended, at all events in a case where the applicant for registration himself limits his application to one of these three heads that I have mentioned, to pay attention to the question of what it was that he claimed to have registered—what sort of design, whether for pattern, shape, or configuration or ornament, in respect of which he claimed registration as for novelty and originality. But if there could be—as I think there could not be—any doubt as to the intention of the Act of Parliament, any such doubt is at once put an end to by the Rules which are made in pursuance of the Act, which Rules prescribe that applications shall be in the forms set forth in the schedule to that Act of Parliament; and the particular forms E and O, which are applicable to an application for the registration of a design, draw the distinction between shape and pattern, and require that the applicant shall do the same thing; because the application form says: "You are hereby requested to register the accompanying design in class ——— in the name of ——— of ——— who claims to be the proprietor thereof, and to return the same to ———."

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Then there is, "Statement of nature of design," and against that there is a mark referring you to a note at the bottom of the form, and that note at the bottom of the form says: "Such as whether it" (that is, the design) "is applicable for the pattern or for the shape." It seems to me impossible to doubt, from the Act of Parliament and the Rules, that the Legislature does draw a distinction between pattern and shape, and that it, at all events, draws the distinction to this extent—that it enables an applicant, if he so chooses, to limit his application to either one or the other. I am not saying that no application could be made which did not draw such a distinction: I have not got to decide that; the point does not arise; but I am saying that the Act of Parliament and Rules clearly enable an applicant in his application to draw the distinction if he likes; and if he chooses to do so, I think that the distinction that he has drawn must be borne in mind in the consideration of every question of novelty and originality.

Now, that being so, in the present case the applicant has limited his application to "pattern." And when one has to answer the question, Aye, or no, is the design registered in this case a new and original design, in my judgment you are not entitled to go outside anything which fairly and properly falls within the definition of "pattern" in this particular application. Inasmuch as the applicant has chosen to limit his design to "pattern," you cannot properly find the novelty or originality in something which is clearly shape as distinguished from pattern.

I am not saying where the line is to be drawn, even in this particular case, between pattern and shape; and still less am I attempting to lay down any hard and fast rule as to what is pattern and what is shape. It seems to me that, so far as the general distinction between pattern and shape is concerned, you must look to the particular subject-matter to which the design is intended to be applied. If you have to apply these words to such different subject-matters as wall-paper, lace, and engineers' patterns, you obviously in practice give a very different meaning to the word "pattern." Sometimes the pattern consists wholly of shape; sometimes the pattern may

consist partly of shape ; and sometimes the pattern, as in the case of pattern stamped upon wall paper, does not involve any shape at all—it is all pattern. But you have to look at the particular subject-matter ; and then, in addition to that, when you come to a particular application, you have not only to construe the word “pattern” in the light of these general considerations which I have been suggesting, but you have also to construe the word “pattern” in reference to the particular application, including in the application—not only the words of the application, but the very design itself as appearing upon the paper.

Now, taking these matters into consideration, I look at this design ; I ask myself what it is that the applicant intended to register ; and I venture to think that, with regard to an Act of Parliament meant to confer an exceptional benefit upon those who comply with its provisions, you should make it a condition of getting such benefit that it shall only be gained by a person if and in so far as he has manifestly complied with the provisions of the Act. And if upon his application it is uncertain whether he has claimed a particular thing as being a portion of the design of which he is the proprietor, it seems to me that it should be given so far against him. For if this Act of Parliament is not to be made an oppression to all Her Majesty’s subjects, it is the duty of any one who wishes to have the benefit of it to make it perfectly clear what it is that he seeks to have appropriated to himself under the powers of the Act.

Now, I have this design before me, and it is suggested that part of the design which is sought to be registered is the sunken centre. I can only say that, in my judgment, the applicant never had any intention of including that in the design for the registration of which he applied. Attention has been called to certain transverse marks which form portions of the paper design, and it is said that those mean a sunken centre. I am not prepared to say that they do not include a sunken centre ; I am not prepared to say that *primâ facie* the thing that the design would strike one as representing may not be a sunken centre ; but, when I look to the manner in which this sunken centre appears in this design, I say that I do not believe the

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applicant intended to claim it at all. I do not believe he intended to claim it, first, because, although the pattern is obviously intended to be one and the same in the five instances which are on this paper, I find that in two instances out of five these transverse marks are wholly omitted. And I say further that, not only are those marks omitted in some of these instances, but, if you take each one of these instances by itself, there are portions of these instances as to which it is common ground that the concrete execution of this design shews a depression or a raising, as the case may be, in which these lines are not used to indicate that particular quality. It seems to me, therefore, that these lines were merely introduced by the draftsman as convenient for the frame upon which he was to illustrate the design sought to be registered. And I think so the more because, on looking at the design which Kekewich J. thought so like the present one as to negative its novelty and originality, I see that, if you wish to claim as part of your pattern the raising or depression of a particular part of the metal-work, you can, in your registered design, so do it by shading as to leave beyond the possibility of doubt what it is you claim. Of course no one can doubt, looking at Sanders' design, that the raising of the raised parts of the shell pattern is there put beyond the possibility of a doubt by the mode of shading which has been adopted; and I think if the applicant had really intended to claim as part of his design—as part of what he calls the pattern in his application—the raising or depression of the metal plate at various parts, that he would have done so in a manner very different from that which he has adopted. I therefore think that, in fact, he has not done it, and I further think that, if he intended to do it, he has not adopted such a clear mode of making his claim as to entitle him to have it taken into consideration as part of the design which he has registered.

Treating this, therefore, as a case relating to the registration of a pattern—by which, in this particular instance, I mean the registration of a raised shell pattern, i.e., a raised shell pattern intended to be applicable to coffin-plates, whether breast-plates, handle-plates, or any other plates—I apply my mind to the

question, Has that pattern, the design of which is registered by means of this piece of paper, No. 232,908, such novelty or originality as to entitle the applicant to keep this design on the register?

Now, everyone refers to *Le May v. Welch* (1) as properly laying down the law as to what amount of novelty or originality is necessary. I merely take the particular passage from Baggallay L.J.'s judgment as being that which in a compendious form expresses it; but substantially the same idea is defined in the judgments of Bowen and Fry L.JJ. Baggallay L.J. says: "There must, according to my view of the case, be some clearly marked and defined difference between that which is to be registered as a new design, and that which has gone before"; and I am going to ask myself, Is there a clearly marked difference in the present case between this design and that which has gone before? Of course, when you are considering that which has gone before, you are not limited to designs which have been registered, and in that sense gone before—a design has equally gone before if it has been in use in the trade; and, therefore, you have to compare this design, for which novelty and originality are claimed, first, with Sanders' registered design, and, secondly, with the concrete examples which have been produced before us. I have Sanders' design here. That the raised shell pattern, in so far as it is a mere raised shell, is not a novelty, is admitted here by Mr. Warrington on behalf of the appellant—in fact, the judgments that have already been delivered in this Court by the Master of the Rolls and Chitty L.J. go upon wholly different lines from those which were put forward by Mr. Warrington—at all events, in the commencement of his argument. But I am pointing out that it is not claimed for the mere raising of the shell that that alone has any sufficient novelty or originality about it; and that being so, you have to look at the shells and see whether there is any difference between them. The one shell is longer, and, to my eyes, may be a little more elegant than the other. Rollason's raised shell is a longer and more elegant shell, it may be, than the shell that appears upon Sanders' registered

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design; but I do not think that that is a substantial and marked difference such as to constitute novelty or originality within the meaning of this Act of Parliament.

Then is there any other difference? When I look at the two shells I do observe this: that outside Rollason's shell, going down to the two outside corners of the shell itself, there is a border or margin of some sort, and I observe in the case of Sanders' shell that there is no such border or margin. Then the effect of having this border or margin is that you leave a hollow cut out of the bottom of each shell, rather like the hollow which one sees in shells on Oriental goods, whether carpets or otherwise, which does catch my eye, and I think would catch the eye of any one looking at this shell. If you carry on the necessary artistic sequence upon that outside margin that I have spoken of, you will find that it leads to a series of details which are not, and from the designer's point of view could not be, in the design as registered by Sanders. Besides these differences, I find none; and I wish to say emphatically that, to my judgment, there is nothing in Rollason's design which would prevent it from being applied to a raised centre, or to a depressed centre, or to a perfectly flat plate. I deal with all these matters, therefore, as mere questions of pattern, and not shape.

Furthermore, although I think that, if I had to look at this pattern by myself, I should probably have come, as the Master of the Rolls and Chitty L.J. have done, to the conclusion that it was a different pattern with a sufficiently marked difference to entitle it to registration, I am very far from saying that, apart from their opinions, I should have been prepared to differ from Kekewich J.

I should not have occupied time with stating what my views were if I had conceived that the whole decision was plainly based upon matters of fact, and involved no matters of law in the sense of the proper mode of applying the provisions of this Act. But I have thought it right to make these observations because I wished to make two propositions plain according to my view of the Act of Parliament. One of those propositions is that the Act draws such a distinction between pattern and

shape that, when an applicant in applying for the registration of a design chooses to base his application upon "pattern," then, in dealing with the question of originality or novelty, the right to registration should be limited to matters clearly falling within "pattern," according to the meaning of that word as used by the applicant in his application. And I wished further to shew that, according to my view of the construction of this Act, if the result of the registered design is to leave it in ambiguity whether a particular matter is or is not included in it, the turn of the scale ought to be made against the applicant, whose duty it is, according to my view, to make it perfectly clear what the design is of which he seeks to become the proprietor to the exclusion of the general public.

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LINDLEY M.R. The appeal will be allowed with costs both here and below.

Solicitors: *Preston, Stow & Preston, for Ansell & Ashford, Birmingham; Stibbard, Gibson & Co., for Rowlands & Co., Birmingham.*

W. W. K.

In re KNIGHT (A LUNATIC).

Lunatic—Jurisdiction, Residence out of—Foreign Curator—English Stocks and Shares—Transfer, Order for—"Vested"—Discretion—Maintenance of Lunatic—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 134, 341.

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The foreign curator of the property and person of a lunatic resident out of the jurisdiction is not entitled as of right to an order under s. 134 of the Lunacy Act, 1890, for the transfer to him of English stocks or shares standing in the name of the lunatic, although "vested" in the curator under that section. The Court has, under that section and its general jurisdiction in Lunacy over the personal property of a lunatic, a discretion as to making or refusing the order; and therefore, as a condition for obtaining the order, the curator must first satisfy the Court by evidence that the property is required for the maintenance or other purposes of the lunatic.

In re Brown, [1895] 2 Ch. 666, considered.

In August, 1894, Agnes Maria Knight, widow, a resident in the Island of Jersey, was found by an order of the Royal Court

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of Jersey a person of unsound mind, and a gentleman resident in Jersey, was, under the laws of the island, appointed curator of her property and person. The personal estate of the lunatic comprised a sum of Consols and also shares in an English bank and an English limited company all standing in her name. The curator accordingly presented a petition in Lunacy under s. 134 of the Lunacy Act, 1890, asking for an order for transfer of the stock and shares into his name. Upon the petition coming before the judge in Lunacy, it was supported by an affidavit by the curator shewing that the property required to be transferred was to be used for the maintenance or sole benefit of the lunatic; but the judge made a note that the affidavit "did not shew that the money was needed for maintenance or for any other purpose of the lunatic." The curator, however, contended that, having been appointed in Jersey and having undertaken to get in the property of the lunatic, he was entitled as of right to have the stock and shares transferred to him, and that the Court had no jurisdiction to deal with the lunatic's property beyond ordering a transfer of it to him, the curator, who was responsible to the Jersey Court for the due application thereof. The curator then filed a further affidavit stating that according to the law of Jersey the whole personal estate of a person to whom a curator had been appointed by the Royal Court of Jersey vested absolutely in such curator, who was able to deal with the same absolutely as directed by his electors, being persons who in the present case had, under the direction of the Jersey Court, made an inquiry into the mental condition of the lady. Upon the petition coming before him again on that affidavit the judge ordered the petition to be adjourned into court for argument on the question of jurisdiction.

*J. G. Wood*, for the petitioner. The question is whether the Court has, under s. 134 of the Lunacy Act, 1890 (1), jurisdic-

(1) Sect. 134 is as follows: "Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the judge in Lunacy, upon proof to his satisfaction that the person has been

declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of

tion to exercise a discretion as to whether it should or should not order stock and shares in this country belonging to a foreign lunatic to be transferred to a foreign curator, the word "stock" including "shares" in a company: s. 341. I submit that the curator is entitled to an order as of right, and that the object of the section is merely to aid the foreign curator to get in the fund which it is his duty to get in; in other words, to provide machinery in aid of his legal right. Although the section is in form permissive—for it uses the word "may"—yet the power thereby conferred upon the Court is one intended by the Legislature to be exercised, and one which it is its duty to exercise where the circumstances so require: *Julius v. Bishop of Oxford* (1), and the cases there cited.

The words "as the judge thinks fit" do nothing more than give the Court a discretion as to the form of, and the mode of giving effect to, the order; they do not qualify the obligation of the Court to make an order in aid of a legal right. It is clear on the authorities that a person appointed out of the jurisdiction to take charge of the property of a lunatic resident out of the jurisdiction can recover personal property of the lunatic in this country: *Scott v. Bentley* (2); *In re Barlow's Will*. (3) In the recent case of *In re Brown* (4) the present point was not actually decided; but the Court did in fact order the transfer of a fund here belonging to a lunatic resident in Victoria to the Master in Lunacy there.

[LINDLEY M.R. The point as to whether the Court would, under s. 134, order the transfer of the whole of the lunatic's property here was left open. (5) His Lordship also referred to *In re Stark* (6) and *In re Garnier*. (7)]

Upon the whole I submit that s. 134 gives the Court no discretion to refuse an order for transfer of a lunatic's stock here upon the application of a foreign curator, and that the section is merely intended to aid a legal right.

the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit."

(1) (1880) 5 App. Cas. 214, 230-1.

(2) (1855) 1 K. & J. 281.

(3) (1887) 36 Ch. D. 287.

(4) [1895] 2 Ch. 666.

(5) *Ibid.* 672.

(6) (1850) 2 Mac. & G. 174.

(7) (1872) L. R. 13 Eq. 532.

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C. A. LINDLEY M.R. We all take the same view of this case.

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It was urged before the judge in Lunacy, sitting in chambers, that he had no jurisdiction in the matter, and the case was adjourned into court to have that point decided. I am clearly of opinion that Mr. Wood has put his case too high, and that it is not our duty to make an order parting with the possession of the lunatic's property without exercising some discretion in the matter. The section of the Lunacy Act, 1890, dealing with this property, that is, with stock that cannot be transferred without an order, is s. 134, which runs thus: [His Lordship read the section, and continued:—]

Now, Mr. Wood has brought himself within this section so far as it gives him the right to make this application. In *In re Brown* (1) this Court put an extensive rather than a restrictive interpretation on the words "vested in a person appointed for the management" of the property of the lunatic; and having regard to that decision, we are quite right in saying that the personal property of this lady has become "vested" in the applicant according to the law of Jersey within s. 134 and the decision in *In re Brown*. (1)

Then comes the question, what ought we to do? We should be running counter to what has been the established practice for the last 100 years or more, if we were to hold that the Court has no discretion in such a case as this. Mr. Wood has referred us to *Julius v. Bishop of Oxford* (2); but that case does not appear to carry him through at all. If we have property of a lunatic here, it is, to my mind, clear almost to demonstration that we have a discretion under s. 134 as to granting or refusing such an application as this. Sect. 90 says, in sub-s. 1, that "The judge in Lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs." Then sub-s. 2 says: "Where the alleged lunatic is within the jurisdiction, he shall have notice of the application and shall be entitled to demand an inquiry before a jury." Then s. 96 says: "Where the alleged lunatic is not within the jurisdiction it shall not be necessary to give him notice of the

(1) [1895] 2 Ch. 666.

(2) 5 App. Cas. 214.

application for inquisition, and the inquisition shall be before a jury." The section, it will be observed, says "shall." Now just consider the effect of those sections. The law is not new: it is as old as the time of Lord Hardwicke, that in the case of a person resident abroad and having property in this country, the Court has jurisdiction to direct an inquisition as to such person and to appoint a committee of that property. So that, if anybody were to apply here for an inquisition as to the sanity of this lady, the Court would have jurisdiction to appoint a committee of the property of this lady within the jurisdiction, and to administer her estate. How, then, can it be incumbent upon this Court, without exercising any discretion at all, to hand over this property to a foreign curator? If Mr. Wood's contention is right, the Court would lose the jurisdiction which it clearly has over a foreign lunatic's property in this country. The real truth is that the jurisdiction of the Court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in s. 134. The point was to some extent considered in *In re Brown* (1), where it was said that the Court must be cautious not to hand over the property unless a proper case was made out. There the Court was satisfied that the property was, in fact, required for the maintenance and support of the lunatic, who was resident in Victoria, and, therefore, made an order under s. 134 for a transfer of funds in this country belonging to the lunatic to the Master in Lunacy in Victoria.

For the reasons I have given, and having regard to the terms of s. 134 and comparing the terms of s. 134 with ss. 90 and 96, and also having regard to the long-established practice as to the jurisdiction of this Court, I am clearly of opinion that Mr. Wood has put his case too high, and that the Court has jurisdiction to exercise its discretion as to making an order such as is now asked for. This case was adjourned into court to have the question of jurisdiction decided. The application must stand over in order that the applicant may be at liberty to file further evidence shewing that the fund is required for the maintenance of the lunatic according to the law of Jersey, and

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C.A.      the grounds upon which the transfer of the stock should be made.

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RIGBY L.J. I am of the same opinion. We should not only be overruling, if not extinguishing, long-established authorities, but deciding something quite novel, if we were to hold that under s. 134 the Court has no discretion. No doubt, *prima facie* the proceedings in Lunacy abroad should be treated with all respect here, and in this case it may very well be that, acting upon our discretion, we may ultimately make the order asked for under s. 134; that, however, must depend upon the nature of the further evidence that may be filed by the applicant. But, in my opinion, the point, which is the only one now before us, namely, whether we have a discretion, must be decided against the applicant.

VAUGHAN WILLIAMS L.J. I am of the same opinion.

LINDLEY M.R. We give the applicant leave to bring in a further affidavit. It is his duty to get in as much of the lunatic's property as he can.

Solicitors : *Bennett & Co.*

G. I. F. C.



*In re* CHICAGO AND NORTH WEST GRANARIES  
COMPANY, LIMITED.  
MORRISON *v.* SAME COMPANY.

NORTH J.

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Dec. 14.

[1897 C. 984.]

*Company—Debenture—Redemption—“Redeemable”—Sinking Fund—Prospectus.*

Debentures issued by a company provided that the company should carry to the credit of a sinking fund in each half-year the sum of 2500*l.*, which should be applied in redeeming at a specified premium, on January 1 and July 1 in each year, so many of the debentures issued as the sum from time to time standing to the credit of the sinking fund should suffice to pay off, the particular debentures to be redeemed on each occasion being determined by half-yearly drawings. The prospectus which the company had previously issued, inviting subscriptions for the debentures, stated that they were to be “redeemable within seventeen years by half-yearly drawings on January 1 and July 1 in each year by the application of a sinking fund of 5000*l.* per annum” :—

*Held*, that, even if the prospectus could be looked at in order to ascertain the contract between the company and the debenture-holders, the word “redeemable” meant only that the debentures were to be liable to redemption during the seventeen years, but that there was no obligation upon the company that they should all be redeemed within that period.

*Seemle*, however, that the debentures contained the whole contract between the company and the debenture-holders, and that the prospectus could not be looked at for the purpose of interpreting the contract.

ACTION set down for trial upon the pleadings.

The action was brought on March 27, 1897, by Charles Morrison, on behalf of himself and all other holders of the 6 per cent. debenture bonds of the defendant company, against the company, to enforce the plaintiffs’ security. The statement of claim contained the following statements : On October 18, 1889, the company issued a prospectus inviting subscriptions for 1200 6 per cent. debenture bonds of 100*l.* each. In this prospectus the debenture bonds were described as “secured by a first charge on all the property of the company, redeemable within seventeen years by half-yearly drawings on January 1 and July 1 in each year, at 110*l.* per bond, by the application of a sinking fund of 5000*l.* per annum.” Each of the debentures

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—
- contained covenants and provisions to the following effect—  
that the company “will pay to [holder] his executors or administrators, or other the registered holder of this debenture, the sum of 100*l.* on November 15, 1906, or on such earlier date as the principal money hereby secured shall become payable in accordance with the conditions indorsed hereon. . . .  
And the company will in the meantime and until actual payment pay interest thereon, or upon so much thereof as may remain unpaid, at the rate of 6 per cent. per annum, by half-yearly payments on May 15 and November 15 in each year. And the company hereby charges with the payment of the said principal money and interest hereby secured, *pari passu* with the other debentures of this issue and the interest thereon, as a floating security, all its present and future property, real and personal, and the undertaking of the company. This debenture is issued upon and subject to the conditions indorsed hereon which shall be and be read as part of this debenture.” Among the conditions indorsed on the debentures were the following:—  
“(4.) A sinking fund for the redemption of debentures of this issue shall be established, and to the credit thereof the company shall in each half-year carry the sum of 2500*l.*, which shall be applied in redeeming, at a premium of 10*l.*, on January 1 and July 1, in each year, so many of the said debentures as the sum from time to time standing to the credit of such sinking fund shall suffice to pay off.  
“(5.) The particular debentures to be redeemed on each occasion shall be determined by half-yearly drawings, which the company shall cause to be made at its registered office for the time being.”  
“(10.) The principal money hereby secured shall immediately become payable. . . .  
“(d.) If the company commits a breach of any of these conditions.”  
“(14.) If the principal money hereby secured shall become payable before November 15, 1906, the registered holder of this debenture must surrender the coupons representing subsequent interest, the company nevertheless paying the interest for the fraction (if any) of the current half-year.”

The statement of claim contained also the following paragraphs:—

“8. The company has each half-year, up to and including January 1, 1897, carried over to the sinking fund mentioned in the said conditions the sum of 2500*l.*, and a sum equivalent to a half-year's interest upon so many of the debenture bonds for the time being redeemed, and has applied the sums so carried over to the redemption of debenture bonds at 110*l.* per bond.

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“9. Prior to the commencement of this action the company determined to limit the payments to the sinking fund to the sum of 2500*l.* each half-year, and on July 1, 1897, the sum of 2500*l.* only was, in accordance with such determination, carried to the credit of the fund, the intention of the company being to distribute as dividends on the preference shares the surplus profits of the company in each year, after paying thereout to the sinking fund half-yearly the sum of 2500*l.*

“10. If the course mentioned in paragraph 8 had been followed on July 1, 1897, and, assuming it to be continued, the whole of the debentures would be redeemed at 110*l.* per bond by means of the sinking fund within seventeen years from July 1, 1889.

“11. The payments to the sinking fund on the basis mentioned in paragraph 8 exhaust the whole revenue of the company, the deficit shewn by the revenue account for the year ending July 31, 1896, to which the plaintiff craves leave to refer, being 2211*l.* 3*s.*, and, so long as the course described in paragraph 8 is followed, no dividend can be paid on the preference shares. On the other hand, if only 5000*l.* per annum were set aside to the sinking fund, a substantial dividend could be paid, but the bonds would not be redeemed at 110*l.* per bond within the said period of seventeen years, and there would be unredeemed and outstanding at the expiration of that period debenture bonds for a considerable amount.”

The plaintiff claimed—“A declaration that the defendant company is bound to set aside on January 1 and July 1 in each year, and to apply in redemption of its 6 per cent. debenture bonds at the price of 110*l.* per cent., such a sum as will be sufficient, if

NORTH J. applied half-yearly, to redeem the whole of the said debenture bonds at that price within seventeen years from July 1, 1889.”

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By their defence the company admitted the allegations contained in the statement of claim, except paragraphs 8, 9, 10, and 11. And the company said that the debenture bonds contained the whole contract between the plaintiff and the company, and that the company had in fact performed the obligations on its part to be performed under condition 4 in the debentures.

*A. R. Kirby*, for the plaintiff. The course which the company originally adopted (as described in paragraph 8 of the statement of claim) was the right course—that is, the sinking fund ought to consist not only of the half-yearly payments of 2500*l.*, but also of a sum equal to the interest on the bonds which have been already redeemed. The words “sinking fund” imply an accumulation at interest. Otherwise the whole of the bonds will not be redeemed within the seventeen years in accordance with the statements in the prospectus. “Redeemable” means that the bonds will all be redeemed within the seventeen years. The prospectus forms part of the contract with the holders of the bonds, and may be looked at.

*Swinfen Eady, Q.C.*, and *R. A. Germaine*, for the company, were not called upon.

NORTH J. I think that *primâ facie* the debenture was the contract and the whole contract between the company and the debenture-holder, and that the prospectus cannot be looked at for the purpose of seeing what the contract was. Each debenture provides that the sum secured by it shall be paid at the end of seventeen years. It may become payable at an earlier date—in the event, for instance, of the omission of the company to pay the interest at the date when it becomes due. But the company are to pay interest from the time when the principal sum becomes payable down to the date of its actual payment. Then condition 4 says that a sinking fund for the redemption of the debentures shall be established, “and to the credit thereof the company shall in each half-year carry the sum of 2500*l.*” It does not say at what time in the half-year this is to be done.

It seems to me that no time is fixed for the carrying over of the 2500*l.*, except that it must be carried over in each half-year and in sufficient time to enable the sums which are to be paid on January 1 and July 1 to be then paid. The 2500*l.* is to "be applied in redeeming, at a premium of 10*l.*, so many of the debentures as the sum from time to time standing to the credit of such sinking fund shall suffice to pay off." [His Lordship then read paragraphs 8, 9, and 10 of the statement of claim, and continued:—] The question is whether the sum of 2500*l.* only, or the sum of 2500*l.* together with a sum equivalent to half a year's interest upon so many of the debentures as were for the time being redeemed, ought to be carried over half-yearly to the credit of the sinking fund. Looking at the debentures, I can see nothing which requires the company to carry over each half-year to the sinking fund more than the sum of 2500*l.* which is mentioned in condition 4. It is said that, if this be so, the debentures will not all be redeemed at the end of the seventeen years, and that the prospectus shews that they are all to be redeemed within that time. I do not think that you can go outside the contract contained in the debentures and look at the prospectus. But, even assuming that you are entitled to look at the prospectus, I am not satisfied that it contains such a contract as the plaintiff alleges that it does. There is in it no reference to the carrying over half-yearly to the sinking fund of any sum beyond the 2500*l.* If this had been intended, one would have expected it to be mentioned. It is said that it is to be inferred from the fact that the debentures were to be "redeemable within seventeen years," and that the debentures cannot be all redeemed within that period unless the interest on the amount of the redeemed debentures is carried half-yearly to the sinking fund as well as the 2500*l.* In the first place, the last of the debentures would not be redeemed in that case till the end of, and not "within," the seventeen years. But the more important point is this: Does "redeemable" mean "liable to redemption," or does it mean that the debentures are to be all, in fact, redeemed within the specified period? In my opinion, it means that they are to be liable to redemption, and there is no

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obligation on the company to redeem them. It is obvious that they could not be redeemed within that period without the aid of the interest upon the redeemed debentures. In my opinion, the word "redeemable" was used for the purpose of informing the debenture-holders that they would not necessarily receive the interest at 6 per cent. during the whole of the seventeen years, because the company had an option to redeem the debentures. In my opinion, the prospectus contained a warning to the debenture-holders that they might have their security taken away from them before the end of the seventeen years, and it did not mean that the interest on the redeemed debentures has to be carried to the credit of the sinking fund in addition to the 2500*l.* I will express my opinion accordingly; and dismiss the action with costs.

Solicitors: *W. H. Paterson; Ashurst, Morris, Crisp & Co.*

W. L. C.

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*In re* SWEETING.

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 Jan. 19, 20.

*Solicitor—Costs—Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12. (1)*

In taxing a solicitor's bill of costs, items relating to business done while the solicitor had not a certificate must be disallowed.

*In re Jones*, (1869) L. R. 9 Eq. 63, is superseded.

THIS was a summons by clients for a review of taxation of a solicitor's bill of costs on the ground that some of the items

(1) The second part of s. 12 of the Solicitors Act, 1874, is: "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

The corresponding provision in s. 26 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), was: "No person who as an attorney or solicitor shall

sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid."

allowed by the taxing master related to business done during a period when the solicitor was uncertificated. The bill had been taxed on an order of course obtained on petition in common form, by which the petitioners submitted to pay what should be found due on taxation.

The solicitor, Edward Sweeting, delivered a bill of costs amounting to 37*l.* 11*s.* 6*d.* in respect of business done in relation to an action brought against Thomas Hales and Frank Randall Mathews, the applicants, which had been dismissed for want of prosecution. The taxing master taxed the bill down to the sum of 35*l.* 1*s.* 3*d.*

The clients took in objections to items to the amount of 23*l.* 16*s.* 2*d.*, relating to business done between November 15, 1896, and July 1, 1897, during which period the solicitor was without a certificate to practise as a solicitor.

The taxing master overruled the objections. His reasons for so doing ended as follows: "Does the statute of 1874, wherein it is provided that no costs in relation to an act done by a person as a solicitor without being duly qualified shall be recoverable in any suit or matter by any person, or the decision of the Appeal Court in *Kent v. Ward* (1), where a solicitor was suing for costs, or both, overrule an express decision in *In re Jones* (2), based on the client's submission to pay, and which was approved by the Court of Appeal in *In re Hope*? (3) If either or both overrule the decision in *In re Jones* (2), I think it is for a Court of competent jurisdiction to declare and not for me; as at present I have an express decision, affirmed by the Court of Appeal, exactly covering the case before me, and one which has not been overruled."

*A. W. Rowden*, for the applicants. The taxing master's decision is based on the case of *In re Jones* (2), on the old Act of 1843, which simply provided that a solicitor should not be able himself to sue for costs incurred in respect of business done while he had no certificate. That Act merely took away certain remedies; it did not destroy the debt; whereas under

(1) (1894) 70 L. T. 612.

(2) L. R. 9 Eq. 63.

(3) (1872) L. R. 7 Ch. 766.

NORTH J. the Act of 1874 the costs cannot be recovered in any action or suit or matter, whether the initiative be taken by the solicitor or any one else. The solicitor here, if these costs were brought into account in taxation, would, by means of a matter set on foot by the client, be able to recover these costs. That the law has been materially altered in respect of the position of an uncertificated solicitor with regard to costs is illustrated by the cases: *Fowler v. Monmouthshire Railway and Canal Co.* (1), *Kent v. Ward* (2), and *In re Simmons*. (3)

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In *Fowler v. Monmouthshire Railway and Canal Co.* (1) it was held that under the Act of 1874 a client could not get from his unsuccessful adversary that part of his solicitor's costs which related to a period during which the solicitor had no certificate, contrary to the decision of *In re Hope* (4) on similar facts on the older law. In *Kent v. Ward* (2) Lord Esher says that a solicitor, under the Act of 1874, who has no certificate is no solicitor, and can make no one liable to him as a solicitor; and in *In re Simmons* (3) Grove J. took a similar view.

*T. B. Napier*, for the solicitor. The decision of *In re Jones* (5), on which the taxing master relied, has not been displaced by the Act of 1874; the decision is based on the fact that the debt to the solicitor was not taken away by the Solicitors Act then in force: in that respect the Act of 1874 effected no alteration. The clients have here submitted to pay what is due.

NORTH J. (after stating the facts). The case of *In re Jones* (5) was relied upon by the taxing master as governing the present case, and one that has not been overruled. I agree with what he says so far as that goes. But a question he does not deal with in terms is whether *In re Jones* (5) has not been displaced or superseded by a subsequent statute, in different language from that of the Act on which *In re Jones* (5) was decided. I think it has: the Act of 1874 has completely altered the

(1) (1879) 4 Q. B. D. 334.

(2) 70 L. T. 612.

(3) (1885) 15 Q. B. D. 348.

(4) L. R. 7 Ch. 766.

(5) L. R. 9 Eq. 63.

position of things on this point, as it admittedly has in other respects. NORTH J.

The Solicitors Act (6 & 7 Vict. c. 73), an Act of 1843, is the Act on which *In re Jones* (1) was decided. At that time the later Act of 1860, 23 & 24 Vict. c. 127, s. 26, was in force, but was not mentioned: I do not think, however, that this makes any difference. The Act of 1843 simply makes a solicitor incapable of maintaining an action or suit to recover costs in respect of business done by him during a period in which he was without a certificate. *In re Jones* (1) was decided on the ground that the debt of the client was not destroyed, but merely certain remedies were taken away, by the statute of 1843; and the client had submitted to pay. Till 1874 that was the state of the law in respect to taxation, and there has been no contrary decision since. In another case, before the Act of 1874—*In re Hope* (2)—a plaintiff had taken successful proceedings and obtained judgment for costs against a defendant; an attempt was made by the defendant to resist payment of a part of the costs on the ground that for some time the proceedings were prosecuted while the plaintiff's solicitor was without a certificate. It was held that the fact that the solicitor himself could not have recovered the costs in an action brought by himself did not prevent his client from recovering those costs from his opponent.

Then came the Solicitors Act of 1874. [His Lordship read the second part of s. 12, and continued:—]

That is a much more stringent enactment than the former Act contained with respect to the costs of an uncertificated solicitor. The first proof that a great alteration was made is that in a case exactly like *In re Hope* (2)—*Fowler v. Monmouthshire Railway and Canal Co.* (3)—it was held that a person who was successful in arbitration proceedings, but whose solicitor was uncertificated during their progress, was not entitled to recover the costs and disbursements of his solicitor from the party otherwise liable. That is one respect in which a complete alteration was made by the new statute. The statute does

(1) L. R. 9 Eq. 63.

(2) L. R. 7 Ch. 766.

(3) 4 Q. B. D. 334.

NORTH J. not, like the older Acts, say that the solicitor shall not recover costs in an action or suit brought by himself, but that no costs, &c., in relation to any act or proceeding done or taken by any person who acts as a solicitor without being duly qualified shall be recoverable in any action, suit, or matter by any person; so that the costs and disbursements cannot be recovered in any matter as well as in any action or suit, whether brought by the solicitor or any one else.

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In the case of *Fowler v. Monmouthshire Railway and Canal Co.* (1) Cockburn C.J. says, in reference to the language of the 1874 statute: "The effect of these words is to extend the operation of the former Acts, and I think they were intended to include the present case, and to prevent, not merely the solicitor himself, but also his client, from recovering such costs. There can be no doubt that this construction may in particular instances operate harshly, but we have only to consider whether the words cover the case before us, and this they certainly do"; and the decision of the other judges was to the same effect. In a recent case before the Court of Appeal—*Kent v. Ward* (2)—an action was brought by a solicitor for costs during a period in which he was uncertificated. It was argued that the Act did not apply. Of course the Act applied, and the actual decision is not in point; but Lord Esher observed, in reference to the position of the solicitor during the period he had no certificate (3): "Could he, during that time, act as a solicitor? I think not, and that he could not make any one liable to him as a solicitor." If it is the case, as I think it is, that the solicitor cannot make any one liable, I do not see how the client can be made liable in the taxation of his solicitor's bill of costs. In this case the client has obtained an order for taxation in common form, by which he submitted to pay what should be found due on taxation: it was argued that made him liable for the costs, notwithstanding that they could not be recovered in proceedings against him. The submission is to pay what shall be found due on taxation. In my opinion, what the client is not liable for ought not to be taken into account in

(1) 4 Q. B. D. 336.

(2) 70 L. T. 612.

(3) 70 L. T. 614.



taxation. I do not see how any costs whatever, which it is enacted cannot be recovered in any action, suit, or matter, ought to be put in a bill of costs. It would be strange if the client who was not in fault could not recover against an unsuccessful opponent (as he cannot) costs incurred by his solicitor while he had no certificate, and yet that the solicitor who was in fault could practically enforce them against his client, by refusing to give up property of the client in his possession. Whatever the position of the parties before the Act of 1874 was, in the taxation of matters arising since the Act a solicitor cannot be allowed anything in respect of business done while he had no certificate. The bill must go back to the taxing master for review, on this footing. The case of *In re Jones* (1) has no application to the Act of 1874.

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Solicitors for applicants: *Greig, Meikle & Briggs.*

The respondent in person.

(1) L. R. 9 Eq. 63.

D. P.

STIRLING J.

## AJELLO v. WORSLEY.

1897

[1896 A. 466.]

March 25, 26,  
27, 30, 31.

*Trade Competition—Underselling—Manufacturer and Retail Dealer—Retailing Goods at Wholesale Price—Damage to Manufacturer—Misrepresentation—Damnum absque Injuria.*

1898

Jan. 18.

As a general rule a trader may sell at any price whatsoever any goods, including goods of another's manufacture, which he either has in stock or expects to acquire, and may offer the same for sale by advertisement, although he thereby damages the trade of the manufacturer; and his motives for so doing cannot be inquired into.

The defendant, a retail dealer, advertised for sale in a newspaper a new piano of the plaintiffs' manufacture of a specified character at the price at which the plaintiffs supplied the same to the trade, and thereby caused other dealers to give up dealing with the plaintiffs; and he continued the advertisement after he ceased to have in stock any pianos of the plaintiffs' manufacture, and after the plaintiffs had refused to supply him, in the expectation of being able to acquire pianos of the plaintiffs' from other dealers:—

*Held*, (1.) that, apart from any question of misrepresentation, the defendant had a legal right to issue the advertisement; (2.) that, though the advertisement amounted to an implied representation that the defendant had in his possession a piano of the advertised description, such misrepresentation was not the cause of the damage to the plaintiffs' trade, and consequently gave no right of action.

THE plaintiffs, by their statement of claim, claimed, 1st, "an injunction to restrain the defendant from maliciously or for the purpose of injuring the plaintiffs in their trade advertising or otherwise offering for sale either (1.) an upright grand, iron frame, check-action, trichord pianoforte of the plaintiffs' manufacture at the price of fifteen guineas (such being less than the plaintiffs' wholesale price for a similar pianoforte), or at any other sum less than the said wholesale price; or (2.) that which is not in fact a new pianoforte of the plaintiffs' manufacture as a new pianoforte of such manufacture"; 2nd, "an injunction to restrain the defendant, his servants and agents, from passing off or attempting to pass off pianofortes of other manufacturers as and for pianofortes of the plaintiffs' manufacture, and from passing off or attempting to pass off that which is not in fact an upright grand, iron frame, check-action, trichord pianoforte of the

plaintiffs' manufacture as and for an upright grand, iron frame, STIRLING J. check-action, trichord pianoforte of the plaintiffs' manufacture."

The plaintiffs were manufacturers of pianos carrying on business in London. They made and supplied to their customers pianos of various classes, including the Britannia model, supplied to the trade at the price of fifteen guineas; class 2, supplied to the trade at the price of seventeen guineas; and class 6*a*, described in their price-lists as "upright grand, iron frame, check-action, trichord," supplied to the trade at the price of 23*l*. 10*s*., in all cases a discount of 5 per cent. for cash or four months' credit being allowed.

The defendant was a furnishing contractor carrying on business in Manchester. In the early part of 1895 the plaintiffs supplied to the defendant at trade prices the following pianos: two pianos of class 2 on January 26 and February 15; one piano of class 6*a*. on April 25; two pianos of the Britannia model class on April 25 and May 5. The two last formed part of an order for twelve pianos of that class which had been given by the defendant to the plaintiffs, but which, in consequence of some dissatisfaction on the part of the plaintiffs as to the price at which their pianos had been advertised by the defendant, the plaintiffs refused to execute. Their definite refusal so to do became known to the defendant in August or September, 1895.

On February 22, 1896, the defendant published in the *Manchester Evening News*, a newspaper having a large circulation in Manchester and the neighbourhood, an advertisement headed—

"Great Sale of Pianos at Worsley's.

"Hundreds of Bargains on View.

"Pianos by all the Great Makers.

"Worsley's, the Pantheon, Gaythorn."

This was followed by some particulars of pianos chiefly second-hand, and then came another division headed—

"New Instruments at Worsley's."

After describing "a magnificent new Erard pianoforte," the advertisement proceeded as follows:—

"A fine upright grand by Ajello, iron frame, check-action, trichord; price 15 guineas, or 15*s*. per month."

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STIRLING J. A similar advertisement appeared in the same newspaper on  
1898 February 24-29 and March 2-7, 1896. A similar advertisement  
AJELLO also appeared in the *Northern Daily Telegraph* on March 7, 21,  
v. 25-28, and April 16 and 17.  
WORSLEY.

The object of the action was to restrain the continuance of these advertisements.

The defendant, on cross-examination, admitted that the meaning of this advertisement was that he had the new instruments in stock ; and by admissions made in the action it was conceded that at the dates of the several advertisements complained of the defendant had no piano of the plaintiffs' manufacture in stock. Consequently the advertisement, in the sense in which it would naturally be understood, was untrue.

It was established by the evidence that the plaintiffs suffered damage by reason of the defendant's advertisements. It was proved that certain of their customers who were retail dealers in pianos declined to give them any further orders on the ground that, buying as they did the plaintiffs' lowest priced pianos (Britannia model) at fifteen guineas, they could not sell new pianos of the plaintiffs' at the price advertised by the defendant ; and that so long as these advertisements continued the public, believing that they could be supplied with the plaintiffs' pianos by the defendant at the price he advertised, would refuse to deal at higher prices ; and in particular Mr. Henry Sharples, a piano and musical instrument dealer at Blackburn and a customer of the plaintiffs, deposed that at the time when the advertisements began to be issued he had in stock one of the plaintiffs' Britannia model pianos, for which he had paid fifteen guineas ; that he had an application for it by a customer, and asked the usual retail price, 24*l.* ; and that the customer refused to give it, and called his attention to the defendant's advertisement. He also stated that, although he had ordinarily no difficulty in selling the plaintiffs' pianos, yet, after the advertisements, he was unable to sell the one in stock, and ultimately sent it away to an agent in a Yorkshire town, where it was sold.

The defendant described his business as that of a general

furnishing contractor, carpet factor, and piano importer and dealer. He stated that it was his practice in business to advertise for sale articles in which he dealt, and, in order to attract the public, to select goods which had been for some time in stock and offer them at low prices, yielding little or no profit, while other goods were offered at prices which yielded considerable profits; that in the commencement of 1896 he fixed on pianos as the subject of advertisement, and began to advertise them as early as February 15, 1896; that at that date he had in stock an instrument of the plaintiffs' of the Britannia model class, and that he selected it (among others) as to be offered at a low price; and that the advertisement was intended originally to refer to this particular piano. It was admitted, however, that on February 22 the defendant had no longer any piano of the plaintiffs' in stock, but the advertisement still continued. The defendant offered two explanations of this. He said first that for a time he was prepared to take orders from customers for the plaintiffs' pianos since, although he could not get them direct from the plaintiffs, he knew several dealers who would supply him. Secondly, he said that it was difficult, or at all events caused additional expense, to alter the advertisements in the newspaper after directions had been given for their insertion.

Upon the question whether the defendant's advertisement was a fair description of the Britannia model class, Mr. Ajello, senior, admitted on cross-examination that a piano of that class was a trichord, and had an iron frame and check-action of a kind; but he said that it could not properly be called an "upright grand." The term, however, appeared, even according to the plaintiffs' witnesses, to be a somewhat elastic one, and not to have any very definite meaning in the trade, being differently applied by different dealers; and, in the opinion of the Court, the defendant's advertisement, though highly coloured, was not an absolutely inaccurate description of a Britannia model instrument.

At the trial the plaintiffs abandoned the claim contained in the first part of paragraph 2 of the prayer of the statement of claim, and sought an injunction to restrain the defendant from

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STIRLING J. advertising any pianos of the plaintiffs' manufacture unless he had in his possession pianos of the class advertised.

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*Hastings, Q.C.*, and *John Cutler*, for the plaintiffs. Although the Court will not interfere with an act done by a trader in the lawful way of his business—*Mogul Steamship Co. v. McGregor, Gow & Co.* (1)—it may be inferred from the judgments of the Lords Justices and the speeches of the noble Lords in that case that where an act of competition is attended by misrepresentation or other circumstances of illegality, and damage flows from it, that gives a right of action. Here the advertisement, the issuing of which by the defendant was an act of competition, amounts to a representation that the defendant had in his possession at the date when the advertisement was issued a new instrument of the plaintiffs' manufacture of the character therein specified, whereas in fact he had not, and it has caused damage to the plaintiffs. They are therefore entitled to relief.

*Grosvenor Woods, Q.C.*, and *E. C. Macnaghten*, for the defendant. This is a case of *damnum absque injuria*, and the plaintiffs have no cause of action against the defendant.

The defendant is at liberty to carry on his lawful business in a lawful way, whether it causes loss to his rivals or other tradesmen or not. He is entitled to sell some of his goods at a less profit than others, and at any price which suits his own convenience, whether with a view to attract customers or to get rid of superfluous stock; and manufacturers have no right to complain that his action in that respect affects their trade. Even if the intention or motive of the defendant in doing what he has done was malicious as against the plaintiffs, the act, being in itself a lawful one, carries no liability: *Mogul Steamship Co. v. McGregor, Gow & Co.* (2); *Mayor of Bradford v. Pickles* (3); *Jenkinson v. Nield*. (4) *Flood v. Jackson* (5) is under appeal to the House of Lords. (6) But there is no evidence here of any malicious motive or intention.

(1) (1889) 23 Q. B. D. 598; [1892] A. C. 25.

(2) [1892] A. C. 25.

(3) [1895] A. C. 587.

(4) (1892) 8 Times L. R. 540.

(5) [1895] 2 Q. B. 21.

(6) Since reversed, sub nom. *Allen v. Flood*, [1898] A. C. 1.

If it be suggested that the intention of the defendant was to cut down profits and so injure the plaintiffs, an intention to induce dealers and the trade generally to reduce profits would be perfectly legitimate.

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If any case of misrepresentation is established against the defendant either as to the class of the piano offered for sale or as to its being in stock, that does not affect the question. The injury complained of is the underselling, and in order to claim any right in respect of such misrepresentation the plaintiffs would have to shew that they were specially affected thereby: *Peck v. Gurney* (1); *Glover v. London and South Western Ry. Co.* (2); *Sharp v. Powell* (3); *Canham v. Jones* (4); *White v. Mellin.* (5) It is not unlawful for any one to advertise for sale goods which he has not actually got in his possession. If after contracting to sell them the vendor finds that he cannot get them he may be liable in damages; but the mere advertising for sale is not unlawful. It can hardly be that in a case of this sort the right of action depends upon the accident of there being a misdescription of the goods, or of the goods not being in stock at the time of the publication of the advertisement. Assuming that the advertisement is not true, and that it injures the plaintiffs, they have no remedy without a legal cause of action; but the only two possible causes of action in this case are trade libel and passing off, and of these the second has been abandoned, and there is no ground for the first, there being no evidence of any intention on the part of the defendant to disparage the plaintiffs' goods.

*Hastings, Q.C.*, in reply.

*Cur. adv. vult.*

1898. Jan. 18. STIRLING J., having stated the facts and reviewed the evidence, and having come to the conclusion, notwithstanding his dissatisfaction at some portions of the defendant's evidence, that there was no sufficient ground for disbelieving the defendant's account of the circumstances

(1) (1873) L. R. 6 H. L. 377.

(3) (1872) L. R. 7 C. P. 253.

(2) (1867) L. R. 3 Q. B. 25.

(4) (1813) 2 V. & B. 218.

(5) [1895] A. C. 154.

STIRLINGJ. which led to the insertion of the advertisements, continued as follows:—

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—

The learned counsel for the plaintiffs asked at the bar for an injunction restraining the defendant from advertising for sale any of the plaintiffs' pianos unless he had in his possession a piano of the plaintiffs' manufacture and of the class advertised. By confining their claim to an injunction so limited, they virtually admit, and I think rightly, that if the defendant had in his possession a piano of the plaintiffs' manufacture and of the class advertised, he might offer it for sale at any price he chose. It is obvious that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit, and either at a profit or at a loss. I take it to be settled by *Allen v. Flood* (1) that the motives of the owner for so acting cannot be inquired into.

I further think that as a general rule any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he expects or hopes to acquire. It is expressly provided by s. 5 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), that "the goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured *or acquired* by the seller after the making of the contract of sale," and these last-mentioned goods are in the Act designated by the convenient term "future goods." If a seller may contract to sell future goods, he must be at liberty, as the first step to such a contract, to offer them for sale, and I see nothing to prevent him from making the offer by advertisement, or in any other lawful way. Again, it seems to me that he is entitled to make the offer at any price he chooses, whether remunerative or not; it may be worth a trader's while to sell some goods at a loss so long as he is able to sell other goods at a countervailing or more than countervailing profit.

In all this I assume that the seller is acting honestly; if what he does is tainted with fraud he may be guilty of an actionable wrong. An illustration is afforded by the case of *Richardson v. Silvester*. (2) There the defendant advertised as to let a

(1) [1898] A. C. 1.

(2) (1873) L. R. 9 Q. B. 34.

farm of which he was not the owner, and which he knew he had no power to let: the plaintiff saw the advertisement and visited and inspected the farm with a view to becoming the tenant. It was held that the plaintiff might maintain an action to recover the expenses to which he had been put, and which were thrown away.

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In the present case the plaintiffs had in the autumn of 1895 refused to supply the defendant with any of their pianos, and they continued that refusal down to the commencement of the action. The defendant could not get from the plaintiffs directly any of their new pianos; but, in my opinion, he might have acquired new pianos of theirs otherwise upon terms which would not indeed enable him to sell them at a profit, but which need not have involved a ruinous loss. If then the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture of the Britannia model type, I think that he would have been within his legal rights.

It is said, however, that the advertisement actually published contained two misrepresentations: first, that the pianos to which they related (being, according to the defendant's own statement, of the Britannia model type) were described "up-right grand . . . iron frame, check-action, trichord"; and, second, that such pianos were in the possession of the defendant at the several dates when the advertisement appeared. As regards the first, I have already said that, in my opinion, the description was not inaccurate; and, in argument, the main stress was laid on the second.

In my judgment, this misrepresentation does not make the advertisement fraudulent, and, in order that a misrepresentation may be actionable, it must not merely be untrue, but cause damage to the person who complains of it. The question then arises, Is the damage complained of by the plaintiffs attributable to the misrepresentation of fact contained in the advertisement? It appears to me that this question must be answered in the negative; for an advertisement such as, in my opinion, the defendant might legally have issued would have produced precisely the same consequences, and been followed by the same damaging results.

STIRLING J. No decision in support of such an action as the present was cited in argument. What was mainly relied on by the plaintiffs' counsel was the following passage from the judgment delivered by Bowen L.J. in the Court of Appeal in *Mogul Steamship Co. v. McGregor, Gow & Co.* (1): "What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always there is no just cause for it."

I do not think it necessary to inquire whether the law, as laid down by the House of Lords in *Allen v. Flood* (2), imposes any limitation or qualification on the views there expressed, for, in my opinion, the present case does not fall within those in which damage is caused by misrepresentation within the meaning of the Lord Justice. The class of cases which he probably had in his mind was that of which *Ratcliffe v. Evans* (3) is an example—namely, where the defendant has intentionally published an untrue statement regarding the plaintiff's business, and thereby has in the ordinary course caused damage to the plaintiff. Here the untrue statement related to the defendant's own business; and I may point out that, if it affected the plaintiffs' business at all, it did not affect it exclusively, for Mr. Sharples, and every music-dealer in the neighbourhood of Manchester who happened at the time to have a piano of the plaintiffs in his shop, suffered damage as well as the plaintiffs. However, for the reasons already given, I think the damage was not caused by the misrepresentation

(1) 23 Q. B. D. 598, 614.

(2) [1898] A. C. 1.

(3) [1892] 2 Q. B. 524.



contained in the advertisement, and consequently the action fails and must be dismissed. STIRLING J.

I cannot, however, approve of the defendant's conduct. The advertisement was not such as ought to have been published, and great negligence was shewn as regards the withdrawal of it. I think, therefore, that the defendant is not entitled to any costs of the action, except in so far as those costs have been increased by the unfounded charge which forms the subject of paragraph 2 of the prayer of the statement of claim.

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Solicitors: *Ralph Raphael & Co.; Pritchard, Englefield & Co., for G. R. Lloyd & Davies, Manchester.*

H. B. H.

# DEUTSCHE NATIONAL BANK v. PAUL.

STIRLING J.

[1897 D. 1585.]

1898  
Jan. 14, 26.

*Practice—Writ—Service of Notice out of Jurisdiction—Rules of the Supreme Court, 1883, Order XI., r. 1 (e), (g).*

J. & Co., who carried on business in London, deposited certain policies of life assurance with the plaintiffs, a German bank, as security for advances, and afterwards created a second charge upon the same policies in favour of E. The plaintiffs subsequently acquired the equity of redemption in the policies, and caused it to be transferred to P. and F. as trustees for the plaintiffs. P. and F. resided in England; E. resided in Germany. The plaintiffs brought an action for foreclosure against P. and F., and obtained leave to give notice, in lieu of service, of the writ to E. out of the jurisdiction. Upon motion to discharge that order:—

*Held*, (1.) that the action was not founded on any breach of contract, and therefore the case did not come within Order XI., r. 1 (e); and (2.) that inasmuch as no actual relief was claimed against P. and F., they were not properly made defendants, but should have been joined as co-plaintiffs; the action was, therefore, not properly brought against them within the meaning of Order XI., r. 1 (g), and the order for service out of the jurisdiction must be discharged.

## MOTION.

The plaintiffs in this action were a German bank carrying on business at Bremen in Germany, and by the writ they claimed a declaration that they were entitled to a charge upon certain

STIRLING J. policies of life assurance, and that the said charge might be enforced by foreclosure.

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In May, 1890, they were applied to by an English firm of merchants, named Jellings Blow & Co., and carrying on business in London, for a credit. They agreed to grant it upon certain terms, one of which was that they should have deposited with them as collateral security the policies in question, being policies for 5000*l.*, issued by the Mutual Life Assurance Society upon the life of Mr. Jellings Blow, the senior member of the firm of Jellings Blow & Co.

On May 1, 1890, Jellings Blow & Co. wrote to the plaintiffs, with reference to the proposed credit, as follows: "As collateral security we beg to deposit with you the following policies on the life of our senior Mr. Jellings Blow, effected in the Mutual Life Insurance Society, London, as per memorandum at foot. You will note the policies amount to 5000*l.*, and the bonuses declared so far to 1926*l.*, consequently the security amounts to 6926*l.* together. We have attached the bonus notices and last receipts for premiums paid and also indorsed the policies in blank."

The policies were sent with this letter, having been previously indorsed by Mr. Jellings Blow, but no formal assignment was ever executed.

On November 15, 1894, the firm of Jellings Blow & Co. being then in difficulties, the defendant Ebbeke, who resided at Bremen, wrote to the plaintiffs giving them notice that he had a lien of 2000*l.* on the policies in their hands, and inclosing a copy of a letter dated August 1, 1894, written by Mr. Jellings Blow to the plaintiffs requesting them in the event of his death after repaying themselves out of the policies to pay 2000*l.* to Mr. Ebbeke.

On December 14, 1894, Jellings Blow & Co. executed a deed of assignment of all their property for the benefit of their creditors, the trustee appointed by that deed being Mr. Herbert Jackson, an accountant carrying on business in London.

On June 5, 1897, the sum of 6022*l.* 6*s.* 2*d.* being then owing to the plaintiffs by Jellings Blow & Co. in respect of advances and interest, the plaintiffs issued a writ against Mr. Jackson

and the defendant Ebbeke, claiming a declaration that they were entitled to a charge for that amount upon the policies, and that the said charge might be enforced by foreclosure. This writ, however, was never served, as negotiations took place which resulted in the purchase by the plaintiffs from Mr. Jackson of the equity of redemption in the policies for the sum of 50*l*. This purchase was carried into effect by a deed by which Mr. Jackson, at the request and by the direction of the plaintiffs (who were parties to the deed), assigned the policies to the defendants, Paul and Farish (both of whom resided in London), subject only to the rights of the plaintiffs and of the defendant Ebbeke.

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The writ in the present action was then issued against the defendants Paul, Farish, and Ebbeke, and upon the application of the plaintiffs an order was made whereby liberty was given to give notice, in lieu of service, of the writ to the defendant Ebbeke at Bremen out of the jurisdiction.

The defendant Ebbeke now moved to discharge that order, and to set aside the service of the notice upon him and all subsequent proceedings in the action, on the ground that the action was not properly brought against the defendants Paul and Farish, but was brought against them as a device for the purpose of bringing in the defendant Ebbeke as a party under Order XI., r. 1 (*g*), and was an abuse of the process of the Court.

Order XI., r. 1, provides that service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever. . . .

“(e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or . . . .

“(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

*Grosvenor Woods, Q.C.*, and *George Lawrence*, for the applicant. The action is not properly brought against Paul and Farish within the meaning of Order XI., r. 1 (*g*). They are not

STIRLING J. genuine defendants against whom the plaintiffs can suggest that they have any cause of action. The plaintiffs do not seek a declaration nor claim any relief as against them. In order to comply with the rule the person sought to be made a defendant must be a "proper" party to the action, which must be "properly brought" against some other person in this country. The Court must be satisfied of bona fides before the jurisdiction ought to be exercised: *Massey v. Heynes* (1); *Indigo Co. v. Ogilvy* (2); *Witted v. Galbraith*. (3)

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Even if there be a technical right to sue, the rule is permissive and not absolute. The Court has a discretion which it is bound to exercise: *Société Générale de Paris v. Dreyfus* (4); *Williams v. Cartwright*. (5)

The contest in this case is between German subjects, neither plaintiffs nor defendant being resident in this country. The proper place of trial is in Germany. The device of creating a bare trustee in this country in order to withdraw a case from a foreign tribunal and take proceedings here against a foreigner ought not to succeed.

*Butcher, Q.C.*, and *Kirby*, for the plaintiffs. The property in question in this case is in England, the documents creating the charges in favour of the plaintiffs and the defendant Ebbeke respectively are in England, and were intended to be treated as English contracts, and we submit that the proper place of trial is in England. If the action were tried in Germany it would have to be enforced here. Foreclosure is the appropriate remedy, and we do not know that that form of relief can be obtained in Germany.

In *Witted v. Galbraith* (3) Lindley L.J. says that the test is, supposing that all the defendants were resident in England, would they have been joined in the action? Applying that test here, it cannot be said that they would not.

[STIRLING J. You have to satisfy me that the action is properly brought against Paul and Farish. Why are they not co-plaintiffs?]

(1) (1888) 21 Q. B. D. 330, 335.

(3) [1893] 1 Q. B. 577.

(2) [1891] 2 Ch. 31, 44.

(4) (1887) 37 Ch. D. 215, 225.

(5) [1895] 1 Q. B. 142, 146.

They are necessary and proper parties to the action, and it is immaterial how they are joined. There is no impropriety in making them defendants.

[STIRLING J. The test is whether you would be ordered to pay the costs occasioned by their being made defendants instead of co-plaintiffs.]

If the action had been against Jackson originally, and, pendente lite, he had assigned to Paul and Farish, then Order xvii. would have applied, and there would have been no impropriety in substituting them for Jackson as defendants. If Jackson had been served before the transfer, Ebbeke could not have objected to the order.

[STIRLING J. Cannot I now make an order that Paul and Farish be made co-plaintiffs instead of defendants?]

There is no application before the Court, and there has been no misjoinder. Such an impropriety must be shewn as would induce the Court under Order xvi., r. 11, to strike out Paul and Farish as defendants and make them co-plaintiffs. No such case has been made out.

[STIRLING J. What is your apparent cause of action against Paul and Farish?]

It is not necessary for us to claim actual relief against them. Take, for example, the case of an action against stake-holders. The Court will not lightly set aside an order for service out of the jurisdiction when *prima facie* the case may properly be tried in this country. Unless it can be shewn that the defendants were put in as a mere device the Court will not intervene. The applicant falls very far short of proving *mala fides*. Having regard to the remedy sought, Paul and Farish were not improperly made defendants to the action. It was done for purely legal reasons, and, the action being properly constituted, there is no case for setting aside the service on Ebbeke.

Moreover, the case might without much straining be brought within clause (e) of the rule.

*Grosvenor Woods, Q.C.*, in reply. There has been no breach of contract here, and clause (e) cannot apply. Paul and Farish were mere trustees for the plaintiffs, and for the purposes of this

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STIRLING J. action might have been disregarded altogether: *Castellan v. Hobson*. (1)

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*Cur. adv. vult.*

Jan. 26. STIRLING J. (after stating the facts). I assume that under s. 25, sub-s. 6, of the Judicature Act, 1873, the legal right to sue on the policies is now vested in the defendants Paul and Farish.

It is admitted that they are simply trustees for the plaintiffs, and are bound to act with reference to the subject-matter of the trust as the plaintiffs direct, and that they have not refused so to do, and do not object to become co-plaintiffs in the action.

To justify service out of the jurisdiction the case must be brought within the provisions of Order XI., r. 1: see *In re Eager* (2); *In re Cliff*. (3) Clause (g) of that rule was mainly relied on, but at a late stage in the argument a suggestion was made that clause (e) might apply, and with that I shall first deal.

The suit claims a declaration that the plaintiffs are entitled to a charge for the sum of 6022*l.* 6*s.* 2*d.* and interest on six policies of assurance, and that the charge may be enforced by foreclosure, and all accounts and inquiries necessary for that purpose, and for further and other relief. The object of the suit therefore, so far as specific relief is thereby sought, is to compel the defendant Ebbeke to redeem the plaintiffs by paying off what is due to them, and in default of payment by him, to have it declared that the plaintiffs are absolute owners of the property on which the charge exists. Under the claim for general relief the plaintiffs would, I apprehend, be entitled to ask that, in the event of the Court refusing to give relief by way of foreclosure, the policies might be sold and the proceeds applied in payment of the plaintiffs' debt. In my judgment, an action so framed is not founded on a breach of contract within the meaning of Order XI., r. 1 (e).

The plaintiffs' title to a charge may have arisen by reason of a breach on the part of Jellings Blow & Co. in not paying

(1) (1870) L. R. 10 Eq. 47, 51.

(2) (1882) 22 Ch. D. 86.

(3) [1895] 2 Ch. 21.

what they owed to the plaintiffs. The action, however, is not founded on that breach, or, indeed, on any other breach of contract, for the defendants have not committed any breach of contract with the plaintiffs: it is founded on the existence of a charge constituting a security for the debt due to the plaintiffs.

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 DEUTSCHE  
 NATIONAL  
 BANK  
 v.  
 PAUL.

Coming, then, to clause (g), the question is whether the present action is properly brought against Paul and Farish. The practice of the Court requires that in an action for foreclosure all persons who have or claim an interest in the equity of redemption should be parties, and I think that to such an action as the present the defendants Paul and Farish are certainly proper if not necessary parties. The rule would be satisfied, however, if those gentlemen had been made co-plaintiffs instead of defendants; and I think that they ought more properly to have been made plaintiffs, in this sense, that any extra costs occasioned by making them defendants might, upon a proper application for that purpose, have been ordered to be borne by the plaintiffs.

Now, Paul and Farish are made parties simply to comply with this rule of practice. Against them no relief is sought—no right is claimed to be enforced. No substantial reason is given why they should be defendants rather than plaintiffs. If the plaintiffs had taken an assignment to themselves instead of to the defendants, the action would not have fallen within Order XI., r. 1. I do not think it is necessary for me to come to the conclusion that the assignment to them as trustees was a mere device to enable this action to be brought; but, in my judgment, the action is not properly brought against them within the meaning of the rule. The order for service out of the jurisdiction must therefore be discharged.

Solicitors: *Druces & Attlee; Norton, Rose & Co.*

G. A. S.

KEKEWICH

J.

1898

Jan. 12.

*In re* PAGET.*In re* MELLOR.

MELLOR v. MELLOR.

[1897 P. 2234.]

*Real Estate—Devise to Uses—Power of Sale—Power of Appointment—Appointment to Trustees for Objects—Trust for Sale—Legal Estate.*

A testator devised real estate to the use of his daughter for life, with remainder to the use of such of her children, for such estates or interests and in such manner as she should by will appoint, and in default of appointment to the use of her children as tenants in common. And he empowered the trustees of his will to sell the property with the consent in writing of the persons for the time being in possession under the foregoing limitations if adult, and if not, then at the discretion of the trustees.

By her will the daughter, in exercise of her power, appointed the real estate to trustees in trust for sale and to stand possessed of the proceeds upon trusts for her children :—

*Held*, that the legal estate was well appointed by the daughter's will to her trustees in trust for sale, and that they were therefore the proper persons to sell.

An appointment of real estate under a power to trustees for objects of the power passes the legal estate in it as effectively as if the property appointed were money instead of land.

*Kenworthy v. Bate*, (1802) 6 Ves. 793, and *Cowx v. Foster*, (1860) 1 J. & H. 30, discussed.

#### ADJOURNED SUMMONS.

Charles Paget, by his will dated June 14, 1871, devised to trustees, their heirs and assigns, certain real estate in the county of Nottingham, described in the 4th schedule thereto, to the uses in favour of his daughter Ellen Mellor and her children or child, and other the uses thereafter declared concerning the same (that is to say) to the use of such daughter for her life without impeachment of waste, and from and after her decease to the use of such one or more, exclusive of the other or others of them, of the child or children of such daughter in such shares and for such estates or interests and subject to such conditions and generally in such manner as such daughter should by will or codicil, notwithstanding her

then present or future coverture, appoint, give or devise the same; and in default of such appointment, gift or devise, to the use of the children of such daughter as tenants in common. And the testator declared that it should be lawful for the trustees therein named at any time thereafter, at the request and by the direction of the person or persons who for the time being should, under and by virtue of the limitations thereinbefore contained, be in possession of the said hereditaments, or be entitled to receive the rents and profits thereof, to be testified in writing, in case such person or persons should be adult, and which consent any such person, if female, might give whether covert or sole, and if covert without the consent of her husband, and in case such person or persons should not be adult, then at the discretion of such trustees, to sell all or any part of such lands and hereditaments and invest the proceeds in manner therein mentioned, such investments to be deemed to be as of the nature of real estate and to go and be enjoyed accordingly. And the testator directed that a second set of trustees should stand possessed of certain legacies and sums of money bequeathed to them upon trust to pay the income to the said Ellen Mellor for her separate use without power of anticipation, with power to appoint by will out of the income a yearly sum not exceeding 500*l.* to any surviving husband for his life, and, subject as aforesaid, in trust for such of her children or other issue born in her lifetime and in such manner as she should by will appoint, and in default of appointment upon trust for her children and other issue per stirpes in equal shares.

By a codicil dated August 7, 1871, the testator declared that the powers of sale and all other powers, directions, and discretions incident thereto respectively contained in his will should, as to the hereditaments by his will devised to the use of his said daughter Ellen Mellor for life with remainders over, be exercisable by the trustees for the time being of the moneys bequeathed on trusts for the benefit of such daughter, her husband and children, instead of by the person or persons by whom the same several powers, directions, and discretions were by his will expressed to be made exercisable.

The testator died on October 13, 1873, leaving surviving him

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**KEKEWICH** his daughter Ellen Mellor, the wife of Alfred Mellor, her second husband. By her first husband, Oliver Paget, who died in 1863, she had one child only, a daughter now married. By her second husband, Alfred Mellor, she had six children, all daughters, who were now living, the youngest being an infant.

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*In re.*  
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By her will, dated October 24, 1875, Ellen Mellor, in exercise of the powers given to her by the will of Charles Paget, appointed the hereditaments comprised in the 4th schedule to the latter will to the use of her husband and two other persons, their heirs and assigns, upon trust for sale; and she further appointed that the trustees of her will should stand possessed of the proceeds upon the trusts thereafter declared concerning the same. And the testatrix thereby further appointed that the trustees of her will should stand possessed of such proceeds, and also of the trust funds over which she had a power of appointment under Charles Paget's will, upon certain trusts for the children of the testatrix by both her marriages, but subject, as to the income of the last-mentioned trust funds, to an annuity of 500*l.* thereby appointed to her husband, Alfred Mellor, if he should survive her, during his life.

Mrs. Mellor died on March 12, 1880.

None of the hereditaments comprised in the 4th schedule to the will of Charles Paget had yet been sold, and the question now arose whether the sale ought to be carried out by the trustees of Mrs. Mellor's will under her testamentary appointment or by the trustees of Charles Paget's will thereto empowered by his codicil. To have this question (among others) decided this originating summons was taken out by the present trustees of Mrs. Mellor's will, including two of her adult children by her second marriage, against the trustees of Charles Paget's will said to have a power of sale, Alfred Mellor (Mrs. Mellor's second husband), Mrs. Mellor's child by her first marriage, and the remaining four children by her second marriage asking (amongst other questions), Who, upon the true construction of the two wills, and in the events which had happened, were the proper persons to sell the real estate particularized in the 4th schedule to the will of Charles Paget, and at whose request (if any) such real estate was to be sold?



*R. J. Parker*, for the plaintiffs. The plaintiffs, Mrs. Mellor's trustees, are the proper persons to sell. A power to appoint real estate is well exercised by an appointment to trustees to sell and to hold the proceeds for objects of the power: *Kenworthy v. Bate*. (1) Such an appointment being good according to the equitable rule, we submit that the legal rule should follow, and that the appointees in trust, having the legal estate, can make a legal title. The cases as to the effect of an appointment to trustees for objects are all collected in Farwell on Powers, 2nd ed. p. 320.

[KEKEWICH J. *Cowx v. Foster* (2), which was a case dealing with real estate, seems to have a bearing on the point. The marginal note is not quite accurate. The freehold estate in that case was limited "to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes and declarations" as the donee of the power should appoint.]

There is very slight difference in form between the limitations in this case and in *Kenworthy v. Bate*. (1)

*G. Cave*, for the defendants, five of Mrs. Mellor's children, took the same view, and submitted that, in *Busk v. Aldam* (3), Malins V.-C. held that *Kenworthy v. Bate* (1) and *Cowx v. Foster* (2) really decided the legal point.

*Younger*, for the defendants, the trustees of Mr. Paget's will claiming to have a power of sale. I do not dispute the validity of an appointment to trustees for objects of the power; but it does not follow that the appointees in trust are the proper persons to sell. The question is one of intention on the part of the donor of the power; and I submit that this testator, by giving his trustees a power of sale, shewed an intention that the right to sell and make a good title should remain in their hands, notwithstanding any appointment of the beneficial interest. According to *Busk v. Aldam* (3), which was a case of personal estate only, the Court, though admitting the validity of an appointment to trustees for objects, declined to allow those trustees to claim a transfer to them of the appointed

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(1) 6 Ves. 793.

(2) 1 J. & H. 30.

(3) (1874) L. R. 19 Eq. 16.

KEKEWICH fund. And that case was recognised by the Court of Appeal in *Scotney v. Lomer*. (1) The principle is stated in Farwell on Powers, 2nd ed. pp. 325-6, where *Busk v. Aldam* (2) and the other cases are cited. *Von Brockdorff v. Malcolm* (3) is another authority in favour of the view that the Paget trustees are the proper persons to sell and to distribute the proceeds among the parties taking under Mrs. Mellor's appointment.

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[KEKEWICH J. I see that in *In re Tyssen* (4) North J. followed *Busk v. Aldam*. (2)]

If Mrs. Mellor's trustees sell, they will be acting contrary to the intention of the original testator, who expressly prescribes that a sale shall be made only with certain consents. Where a power of sale is directed to be exercised with certain consents, and an appointment is made of the estate with certain provisions superimposed and not contemplated by the donor of the power, such as that a sale shall take place without the conditions required by him, the appointment is to that extent bad.

*R. J. Parker*, in reply. Under limitations to uses such as are contained in Mr. Paget's will, the power of sale, as soon as the appointment is made, no longer applies, and the appointor may, in appointing, make any direction he likes as to the sale of the property.

KEKEWICH J. The only question I propose now to decide is whether the legal estate in certain real property described in the 4th schedule to Mr. Paget's will and appointed by Mrs. Mellor's will is vested in the trustees appointed by Mrs. Mellor's will or not. The real estate in question was settled by Mr. Paget's will to uses, and under a power contained in the limitations an appointment was made by Mrs. Mellor in favour of her children, being objects of the power. She did not appoint to uses directly in favour of her children, which she might have done, but she appointed to the trustees of her own will, directing them to hold the property in trust for sale and to divide the proceeds among her children, who were objects of the

(1) (1886) 31 Ch. D. 380.

(2) L. R. 19 Eq. 16.

(3) (1885) 30 Ch. D. 172, 182.

(4) [1894] 1 Ch. 56.

power. It is, in my opinion, perfectly clear that this was a good appointment and that it vested the legal estate in the trustees of Mrs. Mellor's will with a trust for sale, and that they are the proper persons to sell unless Mr. Younger's argument ought to prevail. I arrive at that conclusion upon well-settled principles applicable to the exercise of powers, and also upon the decision of *Kenworthy v. Bate* (1), which was recognised as going that far by Wood V.-C. in *Cowx v. Foster*. (2) It is settled that a power of appointment of a fund in favour of children is well exercised by an appointment to trustees in favour of children. That, in my opinion, is equally good with regard to real estate as to personal estate. In *Kenworthy v. Bate* (1) the question was whether a power of appointing real estate to uses was well executed by a devise to trustees to sell, and an appointment of the money produced by the sale, and it was held that it was; and in *Cowx v. Foster* (2), where the power was to appoint "to such uses, upon and for such trusts," &c., Wood V.-C. held that an appointment to trustees for the benefit of persons who were objects of the power was a good appointment, and that the case was a stronger one for the conclusion at which he arrived than *Kenworthy v. Bate*. (1)

In *Kenworthy v. Bate* (1) Sir William Grant M.R. said (3): "It was supposed, he had all he was entitled to, if he had in money all he could have claimed in land. That is therefore a direct determination, that a power to charge includes a power to sell. Then, does not a power to give include a power to sell for the purpose of giving the money instead of the land?" The cogent result of that seems to be that the legal estate in the land is vested in the trustees just as effectively as if the property appointed were money instead of land. Though that was not decided exactly in *Cowx v. Foster* (2), yet it appears to me that the result that follows is such as I have mentioned.

Then, is that view interfered with by any of the provisions in Mr. Paget's will, such as the power of sale given to his trustees? Mr. Younger has referred to *Busk v. Aldam* (4), which was recognised by Cotton L.J. in *Scotney v. Lomer* (5),

(1) 6 Ves. 793.

(3) 6 Ves. 797-8.

(2) 1 J. &amp; H. 30.

(4) L. R. 19 Eq. 16.

(5) 31 Ch. D. 380.

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and again by North J. in *In re Tyssen* (1), who followed it. But *Busk v. Aldam* (2) only comes to this, that where under a power in a settlement an appointment of a fund has been made to the trustees of another settlement for the benefit of children taking under that settlement, those children being objects of the power, it does not follow as a matter of course that the trustees of the subsidiary settlement are entitled to receive the fund from the trustees of the original settlement, but the question who are the parties to distribute the fund depends upon the intention of the instrument creating the power; and if you find there an intention that the trustees of that instrument shall distribute the fund, that intention shall prevail notwithstanding that the donee of the power shall himself otherwise intend. Therefore, if Mr. Paget intended that the trustees of his will only should be the persons to hold and distribute the proceeds of sale of this land, then I should decide on principle and by analogy to the cases cited by Mr. Younger that I was bound to give effect to his intention. Mr. Paget has given his trustees a power of sale and directions how to sell; and the proper way of reading a will of this kind is to read the power of sale in connection with the power of appointment. It may be inferred that, when he gave his daughter power to appoint, he must have intended that she should have power to appoint the property unfettered by the power of sale, and that all these directions as to the mode of sale were given by him in aid of and not so as to interfere with the appointment under her power. It should all be read together: and the intention of the testator clearly expressed in the power of appointment is not to be defeated by saying that notwithstanding an exercise of that power the control of the property is vested, for the purposes of sale, in the trustees under the will of the donor of the power. In my opinion, it is giving effect to the testator's intention to say that the legal estate is well appointed to the trustees of Mrs. Mellor's will and is now vested in them upon trust for sale; and I so decide.

Solicitors: *Busk, Mellor & Norris*; *Field, Roscoe & Co.*

(1) [1894] 1 Ch. 56.

(2) L. R. 19 Eq. 16.

*In re* WHITE.  
PENNELL *v.* FRANKLIN.

[1891 W. 631.]

*Will—Solicitor—Executor—Trustee—Profit Costs—Power to Charge—  
“Legacy”—Insolvent Estate.*

KEKEWICH  
J.

1898

Jan. 13.

A solicitor who is the sole executor and trustee of a will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the will contains the usual clause empowering him to charge for work done: for the clause being in effect a legacy of profit costs to the solicitor he cannot claim it as against creditors.

WALTER WHITE by his will, dated in 1884, appointed the defendant Samuel Franklin, who was a solicitor, and two other persons, his executors, and devised and bequeathed to them all his real and personal estate upon the trusts therein mentioned. And he declared that his trustees might reimburse themselves or pay and discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the will, and that the said S. Franklin should be the solicitor to the estate and as such, notwithstanding his acceptance of the trusteeship and executorship of the will, should be allowed all professional and other charges for his time and trouble which, if employed as solicitor to the trustees and executors, not being himself a trustee and executor, he would be entitled to make. The testator died on February 4, 1891, and his will was proved by S. Franklin alone, the other executors and trustees having disclaimed.

On February 26, 1891, the plaintiff Elizabeth Pennell commenced by writ a creditors' action for administration against S. Franklin, as executor and devisee of real estate, for the administration of the testator's estate. The next day another creditor commenced a similar action by originating summons. On June 23, 1891, an administration judgment was pronounced in both actions, directing accounts and inquiries; the conduct of the proceedings being given to Elizabeth Pennell, the plaintiff in the first action. Under that judgment the defendant



KEKEWICH Franklin carried in a claim for profit costs due to him as solicitor to the estate. The accounts and inquiries shewed that the estate was insufficient for payment of the debts in full. On September 6, 1897, the same plaintiff took out a summons for further consideration in chambers on prepared minutes by which it was proposed to be declared that, as the testator's real and personal estate was not sufficient for the payment of his debts in full, the defendant was not entitled to any profit costs by virtue of the declaration in the testator's will. As however the defendant insisted on his right to profit costs, the summons was adjourned by the master to the judge upon the point raised by the minutes. The point now came on for argument.

*Church*, for the plaintiff. The declaration in the will allowing the solicitor-executor to charge profit costs is a legacy: *In re Barber* (1), approved in *In re Pooley* (2): therefore profit costs cannot be claimed as against creditors where the estate is insolvent.

[KEKEWICH J. referred to *In re Thorley*. (3)]

Again, the rule is well settled that a solicitor-executor, acting for himself alone, cannot be allowed profit costs: *Cradock v. Piper* (4), discussed in *Broughton v. Broughton*. (5)

*J. G. Wood*, for the defendant. The real point in *In re Barber* (1) and *In re Pooley* (2) was that the solicitor-executor was an attesting witness to the will. Here the claim is for certain work done: it is the right, not the bounty, that is the legacy. The solicitor undertakes the work on the terms that under an express provision in the will he shall be paid. It is hard that a solicitor who has saved the estate expense by acting for himself should not be paid for his work. Here the solicitor has had to defend two actions. If he had employed a separate solicitor, as he would have been justified in doing, the costs would have been greater. By acting for himself the estate has reaped the benefit of reduced costs. The plaintiff cannot sue him as executor without giving effect to the clause in the will.

(1). (1886) 31 Ch. D. 665.

(3) [1891] 2 Ch. 613.

(2) (1888) 40 Ch. D. 1.

(4) (1850) 1 Mac. & G. 664.

(5) (1855) 5 D. M. & G. 160.

There is no reported decision that the want of assets deprives a solicitor-executor of his profit costs.

KEKEWICH J. It is not part of my duty to consider whether a decision against a solicitor is hard upon him, nor can I consider whether really the estate for which he has acted as solicitor would not be better off by his acting and charging as solicitor rather than by his not acting, that is to say, by the employment of some one else. Those considerations are beyond me. What I have to consider is the actual fact. Here a solicitor is allowed by a testator, under a clause which is very common, to charge profit costs notwithstanding that he is appointed executor and trustee. He does act as executor and trustee and also as solicitor, and it turns out that the estate is insolvent. The question is whether he is entitled to charge profit costs against that insolvent estate, that is, against the creditors. The clause in the will is really a gift on condition. It is a gift of the privilege of charging, which the solicitor and trustee, if he chose to act as solicitor, would not otherwise have. It is for him to say, as was put by Bowen L.J. in *In re Thorley* (1), whether it is worth while for him to act or not. He is not obliged to act; but if he does act he must take the risk of not being paid out of the estate. It seems to me that the right to charge profit costs must be regarded as a matter of bounty; but for that clause the solicitor cannot charge. It is a gift by the testator to the solicitor of something the law will not otherwise allow him to take. The testator says, "I allow you to act as solicitor to the trust and to charge profit costs." It is the same thing as a gift of, say, 100*l.*: there is no difference whatever between a gift of profit charges and a gift of 100*l.* In my opinion it is a legacy, and chargeable as such with legacy duty. It appears to me that such is clearly the decision of the Court of Appeal in *In re Thorley* (2); and I believe that legacy duty has been charged against the profit costs of a solicitor-trustee by the Inland Revenue Office for some time past. If then this is a legacy, the whole question is settled: the legatee cannot compete with creditors. A legacy can only

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(1) [1891] 2 Ch. 626.

(2) [1891] 2 Ch. 613.

KEKEWICH come out of that part of the estate which is left after the pay-  
 J. ment of debts and testamentary expenses. This is certainly  
 1898 not a "debt": it is bounty; and being bounty it fails as  
 ~~~~~ against the creditors. It seems hard, no doubt, that a solicitor  
 WHITE, who acts throughout under the impression that he is to get
 In re. profit costs, finds himself deprived of them because the estate
 PENNELL is destroyed by some claim that has in law a priority over his,
 v. but with the propriety of the law I have nothing to do. I
 FRANKLIN. have only to deal with the law as it stands.

There must, therefore, be a declaration that, having regard to the insolvency of the estate, the defendant is not entitled to any profit costs under the declaration in the will. The costs of the plaintiff in both actions must be taxed, and also (subject to the foregoing declaration) the costs of the defendant, as between solicitor and client, and including the defendant's costs, charges, and expenses. The balance of the estate will then be distributed rateably among the creditors.

Solicitors: *Maitlands, Peckham & Co.; S. Franklin.*

G. I. F. C.

KEKEWICH
 J.
 1898
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 Jan. 14.

*In re* MEDOWS.  
 NORIE v. BENNETT.

[1897 M. 1999.]

*Tenant for Life and Remainderman—Income or Capital—Copyhold—Custom—  
 Fines on Renewal of Leases for Lives—Tenants not entitled to Renewal.*

By the custom of a manor copyholds were granted on leases for lives at small quit rents and subject to heriots, on payment of arbitrary fines to the lord. There was no obligation on the lord to renew the leases. A tenant for life, unimpeachable for waste and having only an ordinary power of leasing for twenty-one years, as lord of the manor granted leases for lives and received fines:—

*Held*, that the fines, being received in the customary mode of enjoyment of the manor by the lord, were income and belonged wholly to him.

CLAIM in a creditors' action for administration.

Under the will, dated in 1825, of Evelyn Philip Medows, who died in 1826, certain real estate, including the manors of Penton

Mewsey in the county of Southampton and Chute in the county of Wilts, was limited unto and to the use of William Heather Medows during his life without impeachment of waste, with limitations over under which, in the events which had happened, William Potter was tenant in fee simple, in remainder expectant on the death of William Heather Medows without issue, of one undivided third part or share of such real estate. By the will the tenant for life was empowered to grant leases for any term not exceeding twenty-one years "at the best improved rent and in all other respects upon the usual terms," but there was no power given to him to grant leases for lives.

William Potter died on November 28, 1886, having by his will devised his real estate to Frederick Lewis Edwards and Richard C. Gleed as trustees.

William Heather Medows died on November 19, 1896, without issue, and the defendant Rowland N. Bennett was the executor of his will.

This was a creditors' action for the administration of the real and personal estate of William Heather Medows, in which the usual judgment had been given, and the account of debts was being proceeded with in chambers.

It appeared that, according to the custom which prevailed in each of the two manors, it was usual for the lord to make grants or leases for lives to the tenants of the manors at small quit rents and subject to heriots on their paying fines for renewal, and that W. H. Medows had during his tenancy for life, which lasted over thirty-two years, received fines on renewals in respect of the manor of Penton Mewsey to the amount of 1351*l.*, and in respect of the manor of Chute to the amount of 205*l.*

From evidence given by the steward of the manor it appeared that the fines for renewal on the falling in of the lives were arbitrary, and that the tenants had no right of renewal. It also appeared that since the year 1827 the successive lords of the manors had been tenants for life, and that during the whole of that time it was customary for each succeeding tenant for life as lord to make grants for lives by copy of court roll at the accustomed small rents, and to receive fines, and that this

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MEDOWS,  
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KEKEWICH was permitted by the trustees of the estate. The steward J. further said that if the testator W. H. Medows had not received any fines on making grants for lives by copy of court roll he would, in the thirty-two years and upwards during which he was in the receipt of the rents and profits of the manors, probably have received larger sums from the tenants than he did receive. It was not possible to state what the increased rents would have amounted to, but they would, during the period mentioned, have amounted to a considerable sum; but the custom of both the manors was to grant renewals, and it would have been hard and unjust to the tenants to refuse them, although the amount of fine payable rested with the lord.

J.  
1898  
MEDOWS,  
*In re.*  
NORIE  
v.  
BENNETT.  
—

The manor of Penton Mewsey had been sold in the action with the concurrence of F. Lewis Edwards and R. C. Glead, and in the particulars of sale it was stated that on the falling in of the lives for which the tenements were held the purchaser would become entitled to the actual holdings, or to such fines for the renewal of the tenancies as he might elect to impose, subject to the right of widowhood, according to the custom of the manor.

F. Lewis Edwards and R. C. Glead carried in a claim to one-third of all fines received by the testator W. H. Medows in respect of which he was tenant for life and lord of the manor under the will of Evelyn P. Medows, together with interest thereon from the date of the testator's death; and the consideration of this claim was adjourned into court.

*Sebastian*, for the claimants. Under the peculiar circumstances of this case the deceased tenant for life, as lord of these manors, was not entitled to the fines for his own benefit as income, but they ought to have been treated by him as capital; and the remaindermen for whom I appear are therefore entitled to one-third of the amount of the fines as against the estate of the deceased. The evidence shews that in these manors the copyhold tenants have no right to the renewal of their leases for lives, but that the renewal on the part of the lord is purely voluntary. In granting these renewals in consideration of fines



received, the deceased tenant for life has practically been selling the settled property for uncertain periods. This case is, therefore, entirely different from *Brigstocke v. Brigstocke* (1), where there was a perpetual right of renewal, and it was accordingly held that the tenant for life was entitled to the heriots and fines for renewal, as being in the nature of casual profits accruing during his tenancy for life, and therefore income. The decision in that case was based on the fact that the lease was perpetually renewable: see per Jessel M.R. (2) The fines were income, because they were payable under an obligation arising from the custom of the manor; but in this case no such obligation exists. There is no decided case directly in point; but it is submitted that on principle, these fines being received by the voluntary act of the tenant for life, ought to be treated as capital. The leases by the tenant for life were ultra vires, and he ought to have exercised his powers for the benefit of the whole estate, including the remaindermen, by granting leases at the best rents obtainable; and although the claimants do not seek to set aside the leases, they claim to be entitled to their share of the fines.

*S. L. Bathurst*, for the executor. The validity of the leases granted by this tenant for life as lord of the manor being admitted, it follows that he was entitled to the fines for his own benefit. The leases were granted in the customary and usual course of enjoyment of the manor, and the fines were in the nature of casual profits to which the tenant for life—who, it is to be observed, was unimpeachable for waste—was entitled. The case is analogous to *Dashwood v. Magniac* (3), where a tenant for life was held entitled to the proceeds of timber annually cut on a timber estate, because such cutting was according to the ordinary course of the management of the estate for the preservation of the woods. The nearest case to the present is *Earl Cowley v. Wellesley* (4), where the trustees of a will as lords of a manor granted out waste lands of the manor and received fines which were practically arbitrary, and it was held that the fines belonged to the tenant for life as

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—

(1) (1878) 8 Ch. D. 357.

(3) [1891] 3 Ch. 306.

(2) Ibid. 362.

(4) (1866) 35 Beav. 635, 640, 641.

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income. Apart from the provisions of the Settled Land Act, 1882 (45 & 46 Vict. c. 38, see s. 53), a tenant for life is not a trustee for the remaindermen, but is entitled to enjoy the property for his own benefit, provided he acts fairly and reasonably and enjoys in the ordinary course. These leases, being made according to the custom of the manor, were good : see Scriven on Copyholds (4th ed. chap. iii. p. 91 ; 7th ed. chap. i. s. 2, p. 22), where it is said that “ the law does not regard either the quality of the person of the lord, or the quantity of his estate ” ; but as these claimants have confirmed the leases, it is not necessary to insist upon that point.

Sebastian in reply. *Earl Cowley v. Wellesley* (1) is not in point, because in that case the grants were made by trustees, i.e., impartial persons acting in the due course of management of the estate.

KEKEWICH J. The testator against whose estate the present claim is brought was the tenant for life without impeachment for waste of settled property which comprised two manors, and, therefore, he was, during his life, the lord of those manors. As such lord he from time to time granted renewals of leases for lives of the lands of the manor, receiving on each occasion a fine for the renewal. The question is, whether he was entitled to those fines for his own benefit, or was bound to account for them, wholly or in part, to the remaindermen. The remaindermen say that the tenant for life, although he is not in the full sense a trustee for them, occupies towards them a position of confidence ; that, notwithstanding that he is unimpeachable for waste, he can only use his legal powers for the benefit of the whole estate, and, therefore, for the benefit of the remaindermen ; and that if he does that which is in any way a destruction of the estate, he can be made responsible.

According to the custom of these manors, it was competent to the tenant for life as lord to grant these renewals. It is quite true that the tenants had no right to renewal, but it was customary to grant the renewals, and the existence of such a

custom enables any lord to say that it was right to grant them, KEKEWICH
because there was a legal power, vested in him by reason of his J.
lordship, which he could exercise at his discretion. I apprehend 1898
that the law is correctly stated in the passage which has been MEDOWS,
cited from Scriven on Copyholds, 4th ed. p. 91; 7th ed. p. 22, *In re.*
to the effect that the tenant of copyholds need not inquire NORIE
whether the lord is tenant for life of the manor, or tenant pur v.
autre vie or in tail, but has merely to consider whether he is in BENNETT.
fact the lord of the manor, and that if once that fact is
ascertained, the title of the copyhold tenant is good provided
the grant or lease to him is made according to the custom of
the manor. These leases, therefore, not being otherwise
impugned, appear to me to be good in law. It is said that the
tenant for life ought to have acted differently—that he ought to
have granted common law leases at rack-rents or the best rents
that could be obtained. It is not shewn that any benefit would
have accrued to the estate by his refusing to grant the renewals.
If it had been shewn that he abused his legal power, he would
have been accountable to the remaindermen, and his estate
would be accountable now. The lord was not impeachable for
waste. I do not wish to rely upon that circumstance overmuch,
because I have not been referred to any authority shewing how
far impeachability or unimpeachability for waste is material.
But I think that the tenant for life of a settled manor is
entitled to enjoy his life estate according to the character of
the property of which he is tenant for life. That is conform-
able to the view of the Court in cases concerning timber, as,
for instance, in cases which occur commonly in some parts of
the country, where woods have to be cut every seven or ten
years. If it is right that that should be done, it is right that
the tenant for life should receive the profit. It was the duty
of this tenant for life to do, as regards the remaindermen and
the estate generally, what was fair and reasonable. He acted
according to the custom, and he could not, so far as I can see,
have acted otherwise. In receiving the fines and putting the
money into his own pocket he did that which was customary
and reasonable, not only in the exercise of his legal power, but
according to the nature of the property. On that ground, and

KEKEWICH bearing in mind that he was not impeachable for waste, I think that he was entitled to hold these fines for his own benefit, and that the claim therefore fails.

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Solicitors: *Marson & Son ; Dawson, Bennett & Ryde.*

C. C. M. D.

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Jan. 25.

MERRY v. POWNALL.

[1897 M. 1214.]

Settlement—Settlor's own Property—Income—Life Interest—Bankruptcy, Trust determinable on—Creditors—Void Limitations—Setting aside Settlement, Action for—Parties—Trustees—Beneficiaries—Unnecessary or improper Parties—Costs.

The trustees of a settlement who are defendants to an action successfully brought against them to set aside the settlement are entitled, if they have acted properly in the discharge of their duties as trustees and not put the plaintiff to unnecessary expense, to retain their costs of the action, as between solicitor and client, out of the trust fund before handing it over under the judgment.

An action having been brought by a settlor's trustee in bankruptcy against the trustees of the settlement of the settlor's own property to set aside limitations cutting down his life interest in the event of his bankruptcy, the beneficiaries taking under the limitations over were subsequently added by the plaintiff as defendants at the suggestion of the defendants the trustees, and at the trial appeared to defend separately from their co-defendants the trustees. The action being successful, the trustees were allowed to retain their costs as between solicitor and client out of income in their hands, but the beneficiaries, having chosen to defend, although they had been unnecessarily, but not improperly, made parties, were not allowed any costs.

By her will dated January 19, 1893, Maria Vivian, spinster, gave her residuary real and personal estate to trustees, upon trust for sale and to divide the net proceeds into thirty-two equal parts, and as to fourteen of such parts (therein called "the second portion of her residuary trust moneys") and the income thereof she directed that if William Frederick Hamilton should, within three calendar months from her death, or from his attaining twenty-one (whichever should first happen), to the satisfaction of the said trustees assign, settle, and assure all

the property which should at the time of her death represent the property to which he had become entitled under the will of her sister, Katherine Anne Vivian, together with the accumulations during his minority of the income thereof in such a manner that the same and the income thereof respectively should become vested, either in the said trustees, or in them jointly with a nominee of the said W. F. Hamilton, upon trusts corresponding as nearly as might be with the trusts therein declared concerning the second portion of her residuary trust moneys, then and in such case, but not otherwise, the said trustees should hold such second portion and the income thereof upon the trusts that the income thereof should be paid to the said W. F. Hamilton until his death or bankruptcy, and that on the happening of any such event the corpus and income of the trust fund should be held upon trusts for his children as therein mentioned.

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The testatrix died on April 15, 1893.

W. F. Hamilton attained twenty-one on November 24, 1895, and by an indenture dated the following day, after reciting that he had elected to execute in manner thereafter appearing the property to which he had become entitled under the will of the said Katherine Anne Vivian so as to fulfil the condition imposed on him by the will of the said Maria Vivian in order to derive full advantage thereunder, the trustees of that indenture, who were also the trustees of Maria Vivian's will, at the direction of the said W. F. Hamilton, declared that they held the securities and property therein mentioned, and to which the said W. F. Hamilton was absolutely entitled, upon trust to pay the income to him until he should die or become a bankrupt, &c.—in the usual form providing against bankruptcy or alienation—and after the determination of that trust by bankruptcy, &c., should, if the trustees should in their absolute discretion think fit, pay or apply such income or any part thereof for or towards the maintenance and personal support or benefit of the said W. F. Hamilton, his wife (if any) and children during the remainder of his life, with subsequent trusts for his children or other issue.

In December, 1895, W. F. Hamilton married. On February 5,

KEKEWICH 1897, he was adjudicated bankrupt, and on March 12, 1897, J. a trustee was appointed in the bankruptcy. Since the bankruptcy the trustees of the settlement had retained in their hands the income of the settled property.

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On April 30, 1897, the trustee in bankruptcy issued the writ in this action against the trustees of the settlement of November 25, 1895, to have it declared that the limitations over on the bankruptcy of the said W. F. Hamilton contained in that settlement during his life were void as against the plaintiff, and that the plaintiff was entitled to the income of the property comprised in such settlement during the remainder of the life of the said W. F. Hamilton.

In their defence the defendants, the trustees of the settlement, submitted to deal with the trust funds and income as the Court should direct, and further submitted that the wife of W. F. Hamilton and the infant child of the marriage, as being persons substantially interested in contesting the plaintiff's claim, were necessary parties, and ought to be made parties, to the action.

The plaintiff then amended his writ and statement of claim by adding Mrs. Hamilton and her infant child as defendants, and they put in a defence disputing the claim.

The action now came on for trial.

Warrington, Q.C., Mulligan, Q.C., and C. Gurdon, for the plaintiff. It is now perfectly well settled that a settlement by a man of his own property, whether capital or income, upon a trust for himself until bankruptcy, and with trusts over in that event, is void as against his creditors: *Higinbotham v. Holme* (1); *Macintosh v. Pogose* (2); *Learmouth v. Miller*. (3)

[KEKEWICH J. referred to *Whitmore v. Mason*. (4)]

That was a case of a partnership, not a settlement; but there, following the principle, it was held that a provision in the partnership deed that in the event of the bankruptcy of a partner his share in the partnership property should go over to the other partners was void as against his creditors. We there-

(1) (1812) 19 Ves. 88.

(3) (1875) L. R. 2 H. L., Sc. 438.

(2) [1895] 1 Ch. 505, 511, 513-4.

(4) (1861) 2 J. & H. 204.

fore ask that the income of this trust fund during the life of the settlor W. F. Hamilton may be paid to the plaintiff as his trustee in bankruptcy.

Bramwell Davis, Q.C., and *C. L. Coote*, for the defendants, the trustees of the settlement, submitted to act as the Court should direct.

Renshaw, Q.C., and *A. B. Shaw*, for the defendants, Mrs. Hamilton and her infant child. We cannot contend that the authorities cited on behalf of the plaintiff do not apply to the present case. Even if we were to contend that the settlement of the income could be upheld on the ground of bargain between the bankrupt and the testatrix Maria Vivian or her representatives, that ground is cut away by the observations in the judgment in *Whitmore v. Mason*. (1) Nor can we bring the case within *Ex parte Eyre* (2), where a son sold a reversionary interest to his father for value, and then the father settled an annuity upon the son until bankruptcy. There the settlement was held to be good on the ground that the son's property was purchased by the father for full consideration; but we cannot say that any consideration was paid here.

KEKEWICH J. The case is perfectly clear in favour of the plaintiff. The principle is further illustrated by *Ex parte Barter* (3), where the Court of Appeal expressly stated (4) that "a power upon bankruptcy to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy is invalid." There must therefore be a declaration that the limitation over in the settlement during the life of the settlor in the event of his bankruptcy is bad. Then, Mr. Warrington, what do you say as to the costs?

Warrington, Q.C., for the plaintiff. I submit that there should be no order as to costs. The plaintiff, the trustee in bankruptcy, will take his costs out of the bankrupt's estate. Then, as the defendants, the trustees, supported the settlement, they should not be allowed any costs: *Ex parte Russell*. (5)

(1) 2 J. & H. 213.

(3) (1884) 26 Ch. D. 510.

(2) (1881) 44 L. T. 922.

(4) *Ibid.* 519.

(5) (1882) 19 Ch. D. 588.

KEKEWICH J. Neither can the defendants, the beneficiaries, who have been unsuccessful in maintaining the trust over in their favour in the event of the settlor's bankruptcy, have any costs.

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Bramwell Davis, Q.C., for the defendants, the trustees. We are entitled to our costs in the usual way, this being a mere question of the construction of a settlement. This is not an action to set aside the settlement altogether, the only question being whether we can make any payment of the income of the trust funds under our discretionary power. But even if this were an action to set aside the settlement the trustees would still be entitled to their costs: *In re Holden*. (1)

Renshaw, Q.C., for the defendants, the beneficiaries. We ought to have our costs out of the life estate, as we have been brought here. We were not necessary parties, and we did not ask to be brought here. We ask for costs against the plaintiff who chose to make us parties.

Warrington, Q.C., in reply. It was at the suggestion of the trustees that the beneficiaries were made parties; and surely it was better that the actual beneficiaries should appear and argue a question that directly affected their interests.

KEKEWICH J. It may be said and has been said that where a settlement is set aside there is no fund left, and therefore trustees of nothing can take their costs out of nothing; but in some later cases a more liberal view has been adopted, and it has been decided that the Court has power to direct trustees to deduct their costs before handing over the trust fund. Of course, where a man is seeking to set aside his own settlement on the ground of undue influence, it is very hard to say, as against the trustees of the settlement, that they shall not have their costs out of the fund. In *Dutton v. Thompson* (2), which was the case of a voluntary settlement, it was held by Jessel M.R. that, as the settlement was set aside, there was no deed of which there could be a trustee. Nevertheless he held that although there was no property out of which the trustee could claim costs as a matter of right, yet there was a discretion in the judge to allow or refuse them, and it follows

(1) (1887) 20 Q. B. D. 43.

(2) (1883) 23 Ch. D. 278.

that if a trustee has behaved properly he shall be allowed his costs, and that the strict rule based on the assumption that the fund is gone should not apply. It is not at all easy to say what ought to be done here, apart from the practice of the Court which it is extremely desirable to follow. The plaintiff represents the creditors of the settlor, and those creditors ought not to bear any part of the costs of the litigation—at any rate, not more than the Court can see its way to make them bear—seeing that they have succeeded in recovering that which it was the object of the settlement to take away from them; and it is the more important to bear that in mind, because the statement of claim is framed with great care so as to ask only for that relief which the defendants have admitted at the bar that the plaintiff is entitled to. There has been no waste of costs in claiming more than ought to have been claimed. Then the next question is with regard to the trustees. It is quite true that in their defence and in the discharge of their duty they endeavoured to uphold the settlement, and in order to avoid their responsibility, as far as they properly could, they suggested that the beneficiaries should be made parties, and the plaintiff adopted that suggestion. But still they defended the action, and of course admitted their willingness to hold their fund in trust for those who should be held entitled to it. Ought they or ought they not to have their costs out of this fund which goes to the creditors? Before answering that question, I must take a step further and see who the other parties are. I will not say the trustees were wrong in suggesting that the beneficiaries should be made parties. Trustees have a difficult position to fill, and therefore in such a case as this the objection was not unreasonable. But there was no occasion for the plaintiff to submit to that objection, and it appears to me that he might have obtained everything he wanted without making anybody else a party. That, however, does not carry me much further, because it is one thing to say the plaintiff could have got on without the beneficiaries, and another thing to say that the beneficiaries were improper parties. The old cases all go to shew that there is a considerable

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KEKEWICH difference between "unnecessary" parties and "improper" parties.

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These beneficiaries are, in my opinion, unnecessary parties, but it does not follow that they are improper parties. Any person who has a distinct interest in the subject-matter is a proper party to an action, though he may not be a necessary party. Therefore these beneficiaries were quite proper parties, and if they choose to come in and defend, it seems to me that, being proper parties and being unsuccessful, they cannot now ask to have any part of their costs paid out of the fund, that is to say, paid by the plaintiff.

Having got so far, it seems easier for me to say that the trustees ought to be paid their costs. There is only one set to come out of the fund. The trustees have acted as very little more than stake-holders, and I think it is only fair that they should have their costs out of the fund before it is paid over. Logically, perhaps, I should say that as stake-holders they are only entitled to costs as between party and party, but I think I may fairly say that they do really hold the fund as trustees, though they are not trustees for the plaintiff, but are strangers to him, and that they may get their ordinary costs as between solicitor and client out of the fund.

[His Lordship then gave judgment for a declaration as asked by the plaintiff. The costs of the defendants, the trustees, to be taxed, in case of difference, as between solicitor and client, and to be retained by them out of any accrued income in their hands; the surplus to be paid over to the plaintiff as the trustee in bankruptcy. No order as to the costs of the plaintiff or of the other defendants: but that was not to prejudice any claim that might thereafter be made by the defendants, the beneficiaries, to be paid their costs out of the settled property.]

Solicitors: *G. L. B. Calcott; Woodcock, Ryland & Parker.*

G. I. F. C.

BAXTER v. MIDDLETON.

[1897 B. 2766.]

KEKEWICH

J.

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Feb. 8.

Practice—Lis Pendens—Registration, Order Vacating—Vendor and Purchaser—Specific Performance—Incorporating Order in Judgment—Lis Pendens Act, 1867 (30 & 31 Vict. c. 47), s. 2.

A specific performance action, which had been registered by the plaintiff as a lis pendens, was at the trial dismissed with costs. Upon the application of the defendant the Court included in the judgment an order, under 30 & 31 Vict. c. 47, s. 2, vacating the registration unless the plaintiff set down an appeal from the judgment within a fortnight.

THIS was an action by a purchaser against the vendors to enforce specific performance of a contract for the sale of a business together with the business premises and goodwill. Subsequently to the issue of the writ the defendants, the vendors, took out an originating summons under the Vendor and Purchaser Act, 1874, to have it declared that the contract was not binding on them. Immediately after the issue of the writ the plaintiff registered the action as a lis pendens.

Upon the action and summons coming on by order for trial and hearing together, judgment was given for the defendants dismissing the action with costs.

Warrington, Q.C., and *Ingle Joyce*, for the defendants. We now ask for an order vacating the registration of the lis pendens, under 30 & 31 Vict. c. 47, s. 2, which provides that “the Court before whom the property sought to be bound is in litigation may, upon the determination of the lis pendens, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted bonâ fide, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it.” And then the section goes on to provide that the application to the Court pending the litigation “may be” in a summary way by petition or motion in court, or by summons at chambers. The order vacating the registration should be in the form of an order

KEKEWICH nisi, the plaintiff to shew cause within, say a week, why the order should not be made absolute: *Pooley v. Bosanquet*. (1)
 J.
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 MIDDLETON. should not be included in the judgment dismissing the action.

[KEKEWICH J. referred to *Strousberg v. M'Gregor*. (2)]

Renshaw, Q.C., and *Martelli*, for the plaintiff, asked that sufficient time should be given to appeal from the judgment if desired.

KEKEWICH J. The judgment will include an order vacating the registration of the *lis pendens* unless an appeal is set down within a fortnight. If the appeal is not set down by this day fortnight, the registration will be absolutely vacated. There will be no order on the summons.

Solicitors for plaintiff: *Poole & Robinson*.

Solicitor for defendants: *Donald McMillan*.

(1) (1877) 7 Ch. D. 541.

(2) (1890) 6 Times L. R. 145.

G. I. F. C.

In re CASTELL & BROWN, LIMITED.
 ROPER *v.* CASTELL & BROWN, LIMITED.

[1896 C. 1134.]

*Company—Debentures—Floating Security—Equitable Incumbrancers—Priority
 —Negligence—Possession of Title Deeds.*

ROMER J.

1897

Dec. 14.

1898

Jan. 26.

In 1885 a limited company issued a series of debentures charged upon all its property both present and future, such charge to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debentures. In 1895 the company deposited the title deeds of some of its property with its bankers, on a memorandum of charge under seal, as a security for an overdraft. When this charge was given, the bank had no notice of the existence of the debentures and made no inquiries. In 1896 a debenture-holders' action to enforce the security was commenced in which an inquiry as to priorities was directed :—

Held, that the debenture-holders, having left the title deeds with the company so as to enable it to deal with its property as if it had not been incumbered, could not set up their prior charge against the equitable mortgage to the bank; that the bank had not been guilty of negligence, and, having a stronger equity than the debenture-holders, was entitled to priority.

ADJOURNED SUMMONS.

The question for decision in this case was one of priority between equitable incumbrancers, debenture-holders, and an equitable mortgagee by deposit of deeds, who though subsequent in date to the debentures, had no notice of them when the security was taken and the deeds deposited.

Castell & Brown, Limited, was incorporated in 1884, under the Companies Acts, 1862 to 1880, with power under its articles to borrow money on the security of debentures charged upon the property and rights of the company both present and future, including its uncalled capital.

In 1885 the company issued a series of debentures in the usual form for 28,000*l.* charged upon all its property both present and future. Condition 1 on each debenture provided that the debentures were all to rank *pari passu* in point of charge on the property thereby charged, without any preference or priority one over another, such charge to be a floating

ROMER J. security, "but so that the company is not to be at liberty to create any mortgage or charge upon its freehold and leasehold hereditaments in priority to the said debenture."

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The company had at this time certain freehold and leasehold hereditaments, the title deeds of which were left in the possession or under the control of the directors.

In July, 1892, two of the directors called at the company's bankers, the Union Bank of London, and asked for permission to overdraw the company's account: they brought with them the title deeds of some of the company's property, which were left with the bank as security; the bank manager prepared the usual memorandum of agreement on deposit, which was subsequently brought back to him sealed with the company's seal, signed by two of the directors and counter-signed by the secretary. The bank manager had no notice of the existence of the debentures and made no inquiries.

In August, 1895, further pecuniary assistance was required from the Union Bank, and a fresh memorandum of deposit was sealed and signed as before: the title deeds deposited in July, 1892, remaining all the time in the custody of the bank. No inquiries were made when this fresh memorandum was executed, and the bank manager had no notice of the existence of the debentures.

The interest on the debentures having fallen into arrear, the present action was commenced in April, 1896, by some of the debenture-holders against the company to enforce their security, in which the usual judgment was obtained in the following July, directing an inquiry as to incumbrances and their respective priorities.

At the date of the service on the bank of notice of this judgment, a sum of 220*l.* and interest was owing by the company to the bank on the current account. The bank alleged that it had had no notice of the debentures until served with this notice of judgment, and now claimed to be repaid the 220*l.* and interest in priority to the debenture-holders, and to retain the title deeds until payment. This question of priorities was adjourned into court for argument.

There was evidence on behalf of the bank, that it was the

invariable practice of bankers and bank managers to assume that a customer who was in possession of deeds shewing a title to the property, had power to charge the whole of his interest in such property free from prior incumbrances, and that consequently, it was not usual to make inquiries of a customer depositing his deeds whether there was any prior charge upon the property, as such an inquiry would be resented as implying a suspicion that the deposit was being made fraudulently.

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Farwell, Q.C., and *E. Ford*, for the plaintiffs, the debenture-holders. As between persons having only equitable interests, if their equities are in other respects equal, priority of time gives the better equity: we have priority in point of time; and the bank must make out a very strong case to deprive us of our priority: *Cory v. Eyre*. (1) Negligence cannot be inferred against the debenture-holders from the fact that the company were left in possession of the deeds, because in a floating security of this kind the deeds usually are left with the company; in fact, equitable mortgagees, like these debenture-holders, are not entitled to the deeds. As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other: *National Provincial Bank of England v. Jackson*. (2) It was negligence on the part of the bank not to make inquiries, particularly when dealing with a company, which almost invariably has an issue of debentures; but it was not negligence on our part to leave the deeds with the company. Mere carelessness or want of prudence is not enough to deprive us of priority; the negligence must be gross: *Taylor v. Russell*. (3) Possession of the deeds by the bank is not enough to deprive us of our priority, unless it can be shewn that possession is the result of some carelessness or default on the part of the debenture-holders: *Union Bank of London v. Kent*. (4) We have not been guilty of any negligence which ought to deprive us, as against the bank, of our right through priority of time. We rely, too, on the special proviso at the end of condition 1.

(1) (1863) 1 D. J. & S. 149.

(3) [1891] 1 Ch. 8.

(2) (1886) 33 Ch. D. 1, 13.

(4) (1888) 39 Ch. D. 238.

ROMER J. *Neville, Q.C., and Gore-Browne, for the Union Bank.* It is
 1898 a very usual practice to allow a customer to overdraw his
 CASTELL & account on a deposit of title deeds, and, in dealing with a
 BROWN, customer in the ordinary course of business, the bank was
 LIMITED, entitled to believe that he was acting honestly and was not
In re. bound to make inquiries. The object of these floating securities
 ROPER is to leave the company in possession and full control of its
 u. property so long as it pays the interest. The security was
 CASTELL & taken in the present form to enable the company to appear to
 BROWN, be the absolute owner of this property, and by leaving the title
 LIMITED. deeds with the company the debenture-holders have been guilty
 — of negligence sufficient to deprive them of any advantage
 through priority of time as against us who have possession of
 the deeds: *Northern Counties of England Fire Insurance Co. v.*
Whipp (1); *Farrand v. Yorkshire Banking Co.* (2); *Lloyd's*
Banking Co. v. Jones. (3) Condition 1, relied on by the plaintiffs,
 is an attempt to tack on to a floating security a condition
 giving the debenture-holders a control inconsistent with the
 objects of a floating security. This is a case in which the
 debenture-holders deliberately left the deeds in the custody of
 the company in order that it might appear to be the owner of
 this property; and if the company took advantage of this the
 debenture-holders cannot complain, and any one advancing
 money on deposit of the deeds is, under these circumstances,
 entitled to priority: *Rice v. Rice.* (4) Possession of the deeds
 turns the balance: *Layard v. Maud.* (5)

[ROMER J. referred to *Stackhouse v. Countess of Jersey.* (6)]

The bank could not have inspected the register of the
 company's mortgages, even if it had been usual to make
 inquiries in such cases: *Wright v. Horton.* (7)

Even if we are not to have priority the Court will not deprive
 us of the deeds, on the faith of which the money was honestly
 advanced: *In re Ingham.* (8) [*In re Cooper* (9) was also
 mentioned.]

(1) (1884) 26 Ch. D. 482.

(5) (1867) L. R. 4 Eq. 397.

(2) (1888) 40 Ch. D. 182.

(6) (1861) 1 J. & H. 721.

(3) (1885) 29 Ch. D. 221.

(7) (1887) 12 App. Cas. 371, 376.

(4) (1853) 2 Drew. 73.

(8) [1893] 1 Ch. 352, 361.

(9) (1882) 20 Ch. D. 611.

The money supplied by the bank has been used for the purposes of the company. This gives us a priority: *Wheatley v. Silkstone and Haigh Moor Coal Co.* (1)

Farwell, Q.C., in reply. The bank ought to have made special inquiries in this case: a limited company almost always has an issue of debentures. Some effect ought to be given to the words of condition 1, restraining the creation of any charge in priority to the debentures. [He referred to *English and Scottish Mercantile Investment Co. v. Brunton* (2), *Brunton v. Electrical Engineering Corporation* (3), and *Robson v. Smith*. (4)]

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1898. Jan. 26. ROMER J. This is a question of priority between two equitable incumbrancers. The debentures are prior in date, but the Union Bank, at the time of its charges, had no notice, express or implied, of the prior incumbrance, and, having obtained possession of the title deeds, claims priority under the circumstances of the case. If the equities of the two incumbrancers are in other respects equal, then of course priority depends upon the dates of the charges. But the question is whether under the circumstances of this case the bank has not the better equity so as to entitle it to priority. Now, as between equitable incumbrancers in determining priority, the possession of the deeds has always been treated as a circumstance of great importance. And, indeed, in some of the numerous cases which shew this, there are observations of the judges who decided them which go very far. For instance, in *Rice v. Rice* (5), Kindersley V.-C. said: "We have here, then, ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity." And in *Lloyd's Banking Co. v. Jones* (6), Pearson J. observed: "I think, upon the authorities which have been cited, and which are so well known that it would be pedantry

(1) (1885) 29 Ch. D. 715.

(2) [1892] 2 Q. B. 700.

(3) [1892] 1 Ch. 434.

(4) [1895] 2 Ch. 118.

(5) 2 Drew. 81.

(6) 29 Ch. D. 229.

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for me to go over them again, the doctrine of this Court has always been, that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them." But in my opinion these observations, if taken without any limit or restriction, go too far, for I do not think a prior equitable incumbrancer would lose his priority where he did not obtain the deeds, if the deeds came to the hands of the subsequent incumbrancer through no default of any sort on his part. I therefore proceed to inquire into the circumstances under which, in the present case, the deeds came into the hands of the bank.

In the first place, I cannot hold that there was any negligence on the part of the bank. When making its advances to Castell & Brown, Limited (which I will hereafter call the company), it found the company in possession of the deeds in question, and apparently able, as unincumbered owner, to charge the property. The company purported as such unincumbered owner to give a charge to the bank, and I think the bank was, under the circumstances, entitled to rely upon obtaining a charge free from incumbrance. It is suggested on behalf of the debenture-holders that the bank ought to have made some special inquiries of the company. But it is not suggested that the bank wilfully abstained from making inquiries, and as the bank had no reason to suppose that the company was not fully able to give a valid first charge, and found the company in possession of the deeds, which shewed no incumbrance, I think the bank was not bound to make any special inquiry. It is said on behalf of the debenture-holders that it is so common for companies to issue debentures that the bank ought to have assumed there were some in this case, or at any rate to have specially inquired about debentures. But every company does not issue debentures, and, moreover, every debenture does not charge all property of the company, and certainly not property the title deeds of which are left with the company. It might just as well be said, because it is common for private individuals to mortgage their properties, that a person asked to make advances to a borrower, who appears to be unincumbered owner and has the deeds shewing him to be

such owner, is bound to assume that the borrower has previously mortgaged, or to make special inquiries of him on the footing that he has previously mortgaged. Such a contention appears to me unreasonable. I therefore hold that there was no negligence on the part of the bank.

And I now look to see how it was that the company retained possession of the deeds notwithstanding the issue of the debentures. The reason appears to me obvious. The debentures were only intended to give what is called a floating charge, that is to say, it was intended, notwithstanding the debentures, that the company should have power, so long as it was a going concern, to deal with its property as absolute owner. And I infer it was on this account that the company was allowed to, and did, retain possession of the deeds. In other words, the debenture-holders, notwithstanding their charge, and indeed by its very terms, authorized their mortgagor, the company, to deal with its property as if it had not been incumbered, and left with their mortgagor the deeds in order to enable the company to act as owner. It is true that having given this general authority to the company, the debentures purported to put a certain special restriction on its exercise. By the first condition it was provided, that though the charge was to be a floating security, the company was not to be at liberty to create any mortgage or charge upon its freehold and leasehold hereditaments in priority to the debentures. This restriction was no doubt quite valid as a private arrangement between the company and the debenture-holders. But can the debenture-holders, under the circumstances, set it up as against the bank taking its security without notice? I think not. I take it to be established that if a first mortgagee, even though he has the legal estate, authorizes the mortgagor to retain the deeds in order that the mortgagor may thereby, as ostensible owner of the property, be able to deal with it though only to a limited extent, yet if the mortgagor takes advantage of the deeds so left with him to deal with the property to an extent beyond what was authorized, then the mortgagee cannot set up his charge as against an incumbrancer for value without notice, who claims under the unauthorized dealing and relied on the

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ROMER J. deeds and the apparent ability of the owner to deal with the property free from incumbrances. In *Perry Herrick v. Attwood* (1) Lord Cranworth L.C. : says with reference to a case of the kind, " I agree with the view of the Master of the Rolls, in every part of whose judgment in this case I entirely concur, that if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or through fraud, but with the intention of enabling him to raise a sum of 15,000*l.*, which is to take precedence of the legal mortgage, the mortgagee cannot, as against subsequent mortgagees, complain if, instead of 15,000*l.*, the mortgagor raises 50,000*l.*, because he has himself put it in his power to raise any sum of money he pleases. That is the true nature of this transaction. It is not a case in which there was any negligence. It is not a case, as I am willing to believe, in which there was any fraud, but it is a case in which the mortgagees did deliberately and intentionally leave the deeds in the hands of the mortgagor, in order that he might raise money. To hold that a person who advances money on an estate, the title deeds of which are under such circumstances left in the hands of the mortgagor, is not to have preference, would be to shut our eyes to the plainest equity." And the principle has been acted on in numerous later case, amongst which I may mention *Briggs v. Jones*. (2) This being the case as between a prior legal mortgagee and a subsequent equitable incumbrancer, it is an a fortiori case where the first mortgagee is only equitable. In my opinion, therefore, the bank has a stronger equity than the debenture-holders and is entitled to priority.

I may add that if I was mistaken in my inference that the deeds were allowed to remain with the company because the debentures created a floating charge only, and it was intended that the company should be authorized to act as owner (subject to the special conditions imposed by the debentures), then I cannot see why the debenture-holders should not have obtained possession of or control over the deeds in some shape or form, and they would come within the series of cases which have decided that a first mortgagee, even a legal one, who negligently

(1) (1857) 2 De G. & J. 21, 39.

(2) (1870) L. R. 10 Eq. 92.

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leaves the deeds in the hands of the mortgagor, is postponed to a subsequent mortgagee who obtains the deeds without notice. See (inter alia) *Clarke v. Palmer* (1) and *Northern Counties of England Fire Insurance Co. v. Whipp*. (2)

The matter will go back to the master with a direction to him to certify that the Union Bank has priority over the debenture-holders.

Solicitors: *Pritchard & Sons; Campbell, Reeves & Hooper.*

(1) (1882) 21 Ch. D. 124.

(2) 26 Ch. D. 482.

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Jan. 27.

In re NEW BRITISH IRON COMPANY.*Ex parte* BECKWITH.

[0031 of 1892.]

*Company—Winding-up—Directors' Fees—Companies Act, 1862 (25 & 26
 Vict. c. 89), s. 38, sub-s. 7.*

The articles of association of a company required its directors to possess a share qualification; and provided that the remuneration of the board "shall be an annual sum of 1000*l.* to be paid out of the funds of the company" :—

Held, that although these provisions in the articles were only part of the contract between the shareholders inter se, the provisions were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors; that the remuneration was not due to the directors in their character of members, but under the contract so embodying the provisions; and that, in the winding-up of the company, the directors were entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding-up.

Ex parte Cannon, (1885) 30 Ch. D. 629, distinguished.

THE above-named company was constituted by a deed of settlement in 1843, and obtained certain powers by the Act 7 Vict. c. xxx. In November, 1883, it was incorporated under the Companies Acts, 1862 to 1880, as a company limited by shares, with a nominal capital of 600,000*l.* in 20,000 shares of 30*l.* each.

The articles of association contained the following provisions :—

"1. In the interpretation of these articles . . . 'The board' shall mean the board of directors for the time being of the company, or such number of them as have authority to act for the company."

"44. The qualification of a director of the company shall be the holding in his own right of shares of the aggregate nominal value of not less than 1000*l.*, provided that the company may from time to time alter such qualification."

"62. The remuneration of the board shall be an annual sum of 1000*l.* to be paid out of the funds of the company, which

sum shall be divided in such manner as the board from time to time determine, and they shall (in addition and without prejudice to the indemnity to which they are by law entitled) be repaid by the company all reasonable travelling expenses incurred by them whilst travelling exclusively on the business of the company."

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On June 9, 1892, the company passed an extraordinary resolution in favour of winding-up voluntarily, and on June 25, 1892, an order was made continuing the voluntary winding-up under the supervision of the Court. At the commencement of the winding-up a considerable sum was due to E. L. Beckwith and others, the directors of the company, for directors' fees under art. 62, and in the winding-up they claimed to rank as ordinary creditors in respect of this sum, notwithstanding s. 38 of the Companies Act, 1862. (1)

Dighton Pollock, for the directors. The only objection to the directors being regarded as ordinary creditors in respect of their fees is that the case is governed by *Ex parte Cannon*. (2) But the decision of Pearson J. in that case is inconsistent with what was said by Kay J. in *In re Dale and Plant*. (3)

[WRIGHT J. *Ex parte Cannon* (2) could not be overruled by *In re Dale and Plant*. (3)]

It is, however, distinguishable from the present case. In *Ex parte Cannon* (2) no qualification of directors was required by the articles, and they contained a provision that "the remuneration of the directors for their services shall be such sum as the company in general meeting may from time to time determine." As pointed out by Pearson J., "There was therefore no remuneration fixed. It depended entirely upon the good-

(1) 25 & 26 Vict. c. 89, s. 38: "In the event of a company formed under this Act being wound up . . . (7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself

and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."

(2) 30 Ch. D. 629, 632.

(3) (1889) 43 Ch. D. 255.

WRIGHT J. will of the general meeting whether any, or what, remuneration was given to the directors.”

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Here a qualification is required, and the remuneration is fixed. The directors must have taken office on the terms that the fixed remuneration should be paid, and the money is due to them on the agreement embodying that term, and not in their character of members. [He also referred to *In re Washington Diamond Mining Co.* (1)]

Howard Wright, for the liquidator. The liquidator does not wish to oppose the application if the Court is of opinion that the amount in respect of which the claim is made is legally due.

WRIGHT J. In this case there is a provision in the articles of association which was not to be found in the articles considered by Pearson J. in *Ex parte Cannon*. (2) Art. 62 fixes the remuneration of the directors at the annual sum of 1000*l.* That article is not in itself a contract between the company and the directors; it is only part of the contract constituted by the articles of association between the members of the company inter se. But where on the footing of that article the directors are employed by the company and accept office the terms of art. 62 are embodied in and form part of the contract between the company and the directors. Under the article as thus embodied the directors obtain a contractual right to an annual sum of 1000*l.* as remuneration. I should not decline to follow the decision in *Ex parte Cannon* (2) if the facts of that case were the same as those of the present case. It is for the Court of Appeal, if it thinks proper, but not for me, to overrule the decision of Pearson J., and I do not intend by anything I say to fritter away any obligation of being bound by any previous decision. If art. 62 in this case were like the article considered in *Ex parte Cannon* (2), I should be bound to follow that case; but the provision here is very different. The decision in that case went on the ground that the directors had no distinct contractual position as regarded the company with reference to their remuneration. The present case is within

(1) [1893] 3 Ch. 95.

(2) 30 Ch. D. 629.

the principle laid down in *In re Dale and Plant* (1), and it is not within s. 38 of the Companies Act, 1862, because the remuneration is not due to the directors in their character as members. It is not due to them by their being members of the company, but under a distinct contract with the company.

The claim must therefore be allowed.

Solicitor for directors : *J. Beckwith.*

Solicitors for liquidator : *Freshfields & Williams.*

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F. E.

In re ANGLO-CONTINENTAL CORPORATION OF
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WRIGHT J.

[00335 of 1897.]

1898
Feb. 2, 9.

Company—Winding-up—Surplus Assets—Articles of Association.

The articles of association of a company with a nominal capital divided into 1*l.* shares provided that if on the winding-up of the company the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that as nearly as might be the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls. Shortly after incorporation 100,000 shares were issued on each of which the sum of 5*s.* was paid up, and 25,000 further shares each of which was at once fully paid up. No calls were ever made. In the winding-up of the company, after paying debts and expenses there remained assets sufficient to repay the holders of the 25,000 shares 15*s.* per share, but insufficient to repay all the paid-up capital on the 125,000 shares :—

Held, that a call (actual or in account) of 3*s.* per share must be made on the holders of the 100,000 shares, so as to make these shares paid up to the extent of 8*s.* per share; that the amount so called must be applied in repayment of 12*s.* per share to the holders of the 25,000 shares, making their shares also paid up to the extent of 8*s.* per share, and that the assets in hand would then be divisible among the holders of the whole of the 125,000 shares *pro ratâ*.

Ex parte Maude, (1870) L. R. 6 Ch. 51, and *Birch v. Cropper*, (1889) 14 App. Cas. 525, distinguished.

THE Anglo-Continental Corporation of Western Australia, Limited, was registered under the Companies Acts, 1862 to

(1) 43 Ch. D. 255.

WRIGHT J. 1890, in August, 1895, with a nominal capital of 500,000*l.* in 1898 500,000 shares of 1*l.*

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The articles of association contained the following clauses :—
“15. The board may, if they think fit, receive from any member willing to advance the same all or any part of the money unpaid upon any of the shares held by him beyond the sums actually called for, either as a loan repayable, or as a payment in advance of calls, but such advance, whether repayable or not, shall until actually repaid extinguish, so far as it shall extend, the liability existing upon the shares in respect of which it is received. Upon the money so received, or upon so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company shall pay interest at such rate as the member advancing the same and the board may agree upon.”

“117. Subject to any priorities that may be given upon the issue of any shares, the profits of the company available for distribution shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively.”

“129. If upon the winding-up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.”

By resolutions passed on January 11, 1897, and confirmed as special resolutions on February 5, 1897, it was resolved that

the company should be wound up voluntarily and that a WRIGHT J. liquidator should be appointed.

At the commencement of the winding-up there had been issued 100,000 shares on which 5*s.* per share only had been paid up, and 25,000 other shares which were fully paid up in cash when they were issued to another company en bloc. No calls were in arrear and no payments had been made in advance unless the 15*s.* per share on the 25,000 in excess of the amounts paid on the 100,000 shares could be regarded as paid in advance of calls.

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After providing for the debts and liabilities of the company there remained in the hands of the liquidator assets of the company which were sufficient to return 15*s.* per share to the holders of the 25,000 shares, but were insufficient to return all the paid-up capital on the whole 125,000 shares. The liquidator partly distributed the assets (by paying 10*s.* per share to the holders of the 25,000 shares) on the footing that 15*s.* per share must be paid to them before any payment was made to the holders of the 100,000 shares; but the holders of the last-named shares claimed that, having regard to art. 129, a different mode of distribution should be adopted.

The liquidator accordingly took out a summons for the determination by the Court of the questions—(1.) whether the holders of the 25,000 shares were entitled to receive the 10*s.* per share already paid to them by the liquidator before any payment was made to the holders of the 100,000 shares; (2.) whether a further sum of 5*s.* per share should be paid to the holders of the 25,000 shares before paying anything to the holders of the 100,000 shares, or in what proportion the remaining assets were to be distributed; and (3.) if the Court should be of opinion that the 10*s.* per share had been improperly paid, what steps should be taken to recover the same.

The summons was adjourned into court, and heard before Wright J. on February 2, 1898.

*Arthur J. Chitty*, for the holders of the partly paid 100,000 shares. The question turns on the construction which is to be placed on art. 129. That article is based on a form which was

WRIGHT J. framed to avoid the result arrived at in *Ex parte Maude* (1) and *Birch v. Cropper*. (2) In the former case there was no express provision as to how the surplus assets were to be distributed in a winding-up. The shares were of 25*l.*, and some of them had been fully paid up, while the rest were only paid up to the extent of 20*l.* per share, and it was held that in distributing the surplus assets the holders of fully paid shares were entitled to receive 5*l.* per share before the assets were divided. The principle of levelling up was, therefore, applied where there was no provision as to distribution of surplus assets, and the holders of the 25,000 shares here will contend that the same principle is to be applied now. But here there is an express provision in art. 129 which must have been framed for some purpose other than that of achieving what would have been the result if the articles had been silent as to the distribution of the surplus assets; and it is contended that the first part of the article avoids the rule in *Birch v. Cropper* (2), and that the latter part of the article answers the question put by Mellish L.J. at the commencement of his judgment in *Ex parte Maude* (1) in a way opposite to that in which the question was answered in that case, and that effect must be given to it. To give this effect to the article, it is contended that either surplus assets must be construed as not including capital liable to be called up for the purpose of adjusting the rights of the contributories, or that "paid-up capital," as used in the article, means capital paid up while the company was a going concern, and the losses must be borne in proportion to the capital paid up at the commencement of the liquidation. At this time an aggregate sum of 25,000*l.* had been paid up on the 100,000 shares, and a like aggregate sum on the 25,000 shares; therefore the holders of the 100,000 shares will in the aggregate only have to bear a loss equal to the aggregate loss on the 25,000 fully paid shares, and the loss will fall four times as heavily on the fully paid shares as on those on which 5*s.* only has been paid. [He also referred to Palmer's Company Precedents, 6th ed. vol. i. p. 380.]

*Kirby*, for the liquidator. The liquidator has acted on a

(1) L. R. 6 Ch. 51.

(2) 14 App. Cas. 525.

view different from that taken by the holders of the partly paid shares. "Paid-up capital" includes capital called up or liable to be called up to adjust the rights of the contributories, and does not refer merely to capital paid up before the commencement of the winding-up; and before anything is distributed all round 15s. per share must be repaid to the holders of the 25,000 shares to put them on a level with the holders of the 100,000 shares. The decision of the Court of Appeal in *Ex parte Lowenfeld* (1) governs this case. Alternatively, the amount beyond 5s. per share paid by the holders of the 25,000 shares, i.e., 15s. per share, must be treated as money received in advance of calls under art. 15.

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*Beddall*, for the holders of the 25,000 shares, adopted the argument addressed on behalf of the liquidator.

*Chitty*, in reply. The decision of *Ex parte Lowenfeld* (1) is distinguishable. The reasoning is inapplicable to this case; the Courts were able to attach a definite meaning to the article used in that case: see judgment of Lindley L.J.; and the opposite view would have produced great injustice: see judgment of Davey L.J. The liquidator's contention renders the 129th article nugatory. [He also referred to *In re New Transvaal Co.* (2)]

*Cur. adv. vult.*

Feb. 9. WRIGHT J. This case raises a question of importance as to the proper construction of a form of surplus assets clause which has been adopted with variations since the decision of the House of Lords in the Bridgewater Canal case (*Birch v. Cropper* (3)) with the view of avoiding the effect of that decision.

In the present case 100,000 shares of 20s. each had been issued with 5s. paid up, and afterwards 25,000 more were issued in one block to persons who paid them up in full. The company is now in liquidation. After providing for the debts and expenses a considerable sum remains in hand, and the question is on what principle the sum is to be distributed, or rather returned, to the shareholders.

(1) (1893) 70 L. T. 3.      (2) [1896] 2 Ch. 750.      (3) 14 App. Cas. 525.

WRIGHT J. In *Ex parte Maude* (1) there was in the company's articles of association no express provision for regulating the distribution of surplus assets. The shares had been unequally called up. After payment of the debts and expenses there remained a balance, as in the present case, insufficient for the return of all the paid-up capital. It was held that the real question was not how profits should be distributed, but how a loss should be borne, and that the uncalled capital was as much liable to be called up for the purpose of meeting this loss as it would have been for the payment of debts; and the result was that after the capital account had been equalised by calling up or treating as called up unpaid capital, the whole resulting balance was returned in proportion to the amount paid up on each share—that is to say, to its whole nominal amount—and every shareholder lost the same percentage of what he had subscribed and paid.

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In *Birch v. Cropper* (2) there was again no provision for regulating the distribution of surplus assets. The shares had been unequally called up. There was a large real surplus, i.e., more than enough for the return of all the paid-up capital. North J. and the Court of Appeal held that the paid-up capital must be returned and the balance distributed in proportion to the amounts which had been paid up on the several classes of shares; but the House of Lords held that after the capital paid had been returned the balance must, in the absence of any different provision in the memorandum or articles of association, be distributed in proportion to the nominal amount of the shares. There all equities were satisfied by the return of all capital paid, and there remained no reason for treating the surplus assets as held for the shareholders in proportions differing from the amounts of the shares.

In the present case there is an express provision regulating the distribution of assets after payment of debts and expenses. [His Lordship read clause 129 of the articles of association, and continued:—] The shares are all of the same nominal amount of 20s., but they are unequally paid up. There is no real surplus, for, although there is more than enough to pay

the debts and expenses, there is not enough for the return of the capital paid up. WRIGHT J.

Under these circumstances and under this article there is no room for the application of *Birch v. Cropper*. (1) Had there been a real surplus after returning the paid-up capital it would, by the express terms of the contract, have been divisible, not according to the nominal amounts of the shares, but according to the amounts which had been paid up (subject to correction in respect of any arrear or advances), and which therefore had presumably had the principal merit in earning the profit. There being no such surplus, however, but a deficit on the whole adventure, there still remains an equity to be satisfied in order to equalise the loss, and the uncalled capital ought, on general principles, to be called up or treated as called up so far as is necessary for that purpose, unless the contract has otherwise provided. I think that it has not otherwise provided. It says that in the event which has occurred the surplus assets shall be distributed so that the losses shall be borne by the members in proportion to the capital paid (subject to correction in cases of arrear or advances) on the shares held by them respectively at the commencement of the winding-up.

What is the meaning of the term "capital paid"? On a somewhat similar article it was held by the Court of Appeal in *Ex parte Lowenfeld* (2) that those words did not mean merely capital paid before the liquidation, or called up in the liquidation for payment of debts and expenses, but must be held to include capital called up or treated as called up for the very purpose of satisfying equities in the repayment of capital. So in the present case. There is not in truth a surplus at all, but a mitigation of loss. The loss and the mitigation of it are, I think, intended to be distributed equally, but subject to equalisation of the capital account, and not irrespectively of such equalisation; and a call, actual or in account, is necessary for that equalisation which is an essential part of a winding-up, unless excluded by the contract; and the amount of that call must be included in the words "capital paid or which ought to have been paid." The same thing may be put in another way,

(1) 14 App. Cas. 525.

(2) 70 L. T. 3.

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WRIGHT J. as implied in the term "surplus assets" when used in relation to this subject-matter. So used, the term *primâ facie* implies that the capital account must have been properly equalised before any balance can exist for a general and equal return of capital, or for equal division of profits.

Then how are the figures to be worked out? In my judgment the liquidator must proceed to make a call (either actual or imaginary, as the case may require) on the 100,000 shares sufficient to equalise the capital account. If all the shareholders are solvent the call will in this case be one of 3s. per share on the 100,000 shares, making them 8s. paid. The amount so obtained will be sufficient to repay to the holders of the 25,000 shares 12s. per share, leaving them also with 8s. paid. The assets in hand will then be divisible equally among the whole 125,000 shares, and the ultimate loss of each shareholder will be the difference between the 8s. and the dividend so paid. Assuming the moneys in hand to be 25,000*l.*, then each of the holders of the 100,000 shares will as a result of the whole have received back 1s. per share, and each of the holders of the 25,000 shares 16s. per share, and every shareholder will have lost 4s. per share.

The only alternative that I can see is to hold that every 5s. paid up is to abate equally; but on this alternative the result will be just the same as on the other if "paid up" is to have the meaning assigned to it in *Ex parte Lowenfeld* (1)—that is to say, is to include sums called up for equalisation of the capital account.

A contention was urged that the 15s. paid up on the 25,000 shares beyond the 5s. paid up on the 100,000 shares was an amount paid up in advance of calls. If so, the effect would be that no part of the loss would under this article be borne by the 25,000 shares in respect of the 15s. paid in advance, and they must be repaid the whole of this 15s. before there can be any return of capital. On the assumed figures the ultimate result seems to be the same. To repay the 15s. per share on the 25,000 shares 18,750*l.* will be required, leaving 6250*l.*, or 1s. per share for return on the whole 125,000 shares. But as on

other figures the result might not be the same, it seems necessary to express an opinion. I do not think that the expression "amounts paid in advance of calls," as used in this article, is properly applicable to the 15s. paid up on the whole class of the 25,000 shares in excess of the amount paid up on the other shares. It seems to me more properly referable to individual prepayments made by special arrangements under art. 15, just as the words "capital which ought to have been paid" seems properly referable to individual arrears of calls.

Solicitors for liquidator: *Ashurst, Morris, Crisp & Co.*

Solicitor for partly paid shareholders: *J. J. Ridley.*

Solicitors for fully paid shareholders: *Batchelor & Cousins.*

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Feb. 16;  
March 7.

*Lunatic — Maintenance — Execution Creditor—Priority—Lunacy Act, 1890*  
(53 & 54 *Vict. c. 5*), ss. 116, 117, 120.

The Court in Lunacy will not allow property of a lunatic in its custody to be applied in paying his creditors without first providing for his maintenance; but it has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the Court.

The issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor until an order is made shewing that the Crown has actually taken the property under its protection.

A judgment creditor of a person not found lunatic by inquisition, after receiving notice of the pendency of a summons in lunacy for the appointment of a receiver under s. 116 of the Lunacy Act, 1890, issued a *fi. fa.* under which the goods of the debtor were seized before any order was made upon the summons. A receiver was afterwards appointed while the goods were in the possession of the sheriff:—

*Held*, that the Court had no jurisdiction to order a sale of the goods under s. 117 of the Lunacy Act, 1890, for the maintenance of the alleged lunatic in priority to the claims of the creditor.

*In re Winkle*, [1894] 2 Ch. 519, distinguished.

IN this case a judgment creditor of Charles Clarke, a person not found lunatic by inquisition, issued a *fi. fa.* on January 8, 1898, under which the judgment debtor's goods were seized on January 17, 1898. After the judgment had been obtained, namely, on December 31, 1897, a summons in lunacy was taken out in order to obtain the appointment of a receiver under s. 116 of the Lunacy Act, 1890. Notice of the pendency of this summons was given to the judgment creditor before he issued the *fi. fa.* After the seizure under the *fi. fa.*—namely, on January 18, 1898—an interim receiver was appointed, and notice was given to the sheriff to withdraw, which, however, the execution creditor told him not to do. On January 21, 1898, an order appointing a receiver was made, and notice of this order was given to the sheriff, and he was again asked to withdraw; but the execution creditor directed him not to do so, and he remained in possession. On January 28, 1898, the

sheriff issued this summons in lunacy asking for directions how to act, and the summons was adjourned into court.

*Manisty*, for the sheriff.

*Buckmaster*, and *Ivor Bowen*, for the receiver, the wife of the alleged lunatic. The receiver asks that the property seized by the sheriff may be sold by order of the Court under the powers of ss. 117 and 120 of the Lunacy Act, 1890, and that the proceeds may be applied for the maintenance of the lunatic in priority to the claim of the execution creditor, as was done in *In re Winkle*. (1) The application is based upon two grounds—first, that there are no sufficient funds for the maintenance of the lunatic; and, secondly, that the sheriff by appearing, and through him the execution creditor, must be taken to have submitted to the jurisdiction of the Court. While the goods are in the possession of the sheriff they are in the custody of the law, but they still remain the property of the debtor: *Giles v. Grover* (2), per Lord Tenterden. Inasmuch as the supposed lunatic still remains the owner of the goods, this Court may, in the exercise of its jurisdiction in lunacy, order them to be sold to provide for his maintenance.

[LINDLEY M.R. *Ex parte Williams* (3) and *Slater v. Pinder* (4) shew that when the goods are seized the creditor is in the position of a secured creditor in regard to them.]

The jurisdiction conferred by the Lunacy Act, 1890, commenced from the moment when the summons for the appointment of a receiver was issued. The Court had seisin of the matter from that moment, and it will not allow its statutory powers over the property of the lunatic to be defeated by the subsequent levying of execution by a creditor who has full knowledge of the proceedings in lunacy.

[They also referred to *Union Bank of London v. Lenanton* (5); *In re Ball* (6); *In re Leavesley* (7); *In re Plenderleith* (8); *In re Farnham*. (9)]

(1) [1894] 2 Ch. 519.

(2) (1832) 1 Cl. & F. 72, 219.

(3) (1872) L. R. 7 Ch. 314.

(4) (1872) L. R. 7 Ex. 95.

(5) (1878) 3 C. P. D. 243; 38 L. T. 698.

(6) (1828) 2 Molloy, 145.

(7) [1891] 2 Ch. 1.

(8) [1893] 3 Ch. 332.

(9) [1895] 2 Ch. 799; [1896] 1 Ch. 836.

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*E. Ford*, for the execution creditor. The Court has no jurisdiction in this case to interfere with the rights of the execution creditor.

*Giles v. Grover* (1) raised the question of the priority of the Crown over other creditors, and decided that that priority was not taken away by seizure under an execution. That has no application to the present case. In *In re Winkle* (2) the circumstances were very special, and it is distinguishable from the present case by the fact that there the sheriff had withdrawn from possession. With respect to the date from which the jurisdiction commences, the mere fact of issuing a summons which may never be proceeded with does not give the Court jurisdiction over the property of the lunatic, and no notice that an application was to be made for the appointment of a receiver can affect the rights of the execution creditor until the appointment is actually made. It has never been suggested that the appointment of a receiver relates back to the date of the application, and an *ex parte* order might have been obtained at any time after the summons was issued.

[Counsel then proposed to refer to the evidence to shew that this was not a proper case for the interference of the Court, assuming it had jurisdiction;] but their Lordships intimated that they would determine the question of jurisdiction before considering the merits.]

*Buckmaster*, in reply.

At the conclusion of the arguments, neither party objecting, the Court ordered the sheriff, without prejudice to any question, to sell the goods and pay his expenses, and to pay the net proceeds into court, and reserved judgment upon the rest of the case.

March 7. LINDLEY M.R. delivered the judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.). After stating the facts as above set out, his Lordship continued as follows :—

At the hearing of the case on February 16, it being obviously

(1) 1 Cl. & F. 72.

(2) [1894] 2 Ch. 519.

for the benefit of every one that the sheriff should be got rid of, and no one objecting, the Court ordered the sheriff to sell the goods and to pay the proceeds, less his expenses, into court in the matter of lunacy. But this order was made without prejudice to any question between the lunatic or the receiver in lunacy on the one hand, and the execution creditor on the other, and the Court took time to consider their respective rights and the right of the Crown as the protector of lunatics and their property. These rights have now to be determined.

Unless the right of the Crown and the jurisdiction of the Judge in Lunacy can be regarded as arising when the summons was taken out—namely, on December 31, 1897—so as to place the lunatic and his property under the protection of the Crown on and after that date, it seems plain that the proceeds of sale ought to be paid to the execution creditor, and not to the receiver in lunacy. It is very true that the property in goods seized under a *fi. fa.* remains in the execution debtor until sale: *Giles v. Grover*. (1) But it is no less true that after seizure and before sale the execution creditor is as regards those goods in the position of a secured creditor: see *Ex parte Williams* (2) and *Slater v. Pinder*. (3) He had a legal right as against the execution debtor—i.e. owner of the goods—to have the goods sold and to be paid out of the proceeds of sale.

Further, in this case it cannot be said that the goods were ever in the possession of the receiver. Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession of the goods. This circumstance distinguishes this case from *In re Winkle* (4), where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a judge at chambers. The judgment of the Court proceeded entirely on this ground, and *In re Winkle* (4) is no authority for saying that the Court in Lunacy can deprive execution creditors of their rights over property not under the control of the Court when seized under legal process. The cases of *In re*

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(2) L. R. 7 Ch. 314.

(3) L. R. 7 Ex. 95.

(4) [1894] 2 Ch. 519.

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*Plenderleith* (1) and *In re Farnham* (2) shew that whilst on the one hand the Court will not allow property in its custody and belonging to a lunatic to be applied otherwise than for his benefit, and will not pay his creditors out of it without first providing for him, yet, on the other hand, the Court in Lunacy has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the Court. It was, however, suggested that as soon as the summons in lunacy was issued the jurisdiction of the Crown exercisable by the Judge or Court in Lunacy became exercisable over the lunatic's property, and that his property ought to be regarded as under the protection of the Crown from that time. In a sense this is true, for as soon as the summons was issued the Judge in Lunacy had jurisdiction to make orders for the protection of the lunatic's property; but until some order is made shewing that the Crown has actually taken the property of the lunatic under its protection, it has never yet been held to be withdrawn from legal process by a creditor of the lunatic.

The Court in Lunacy has gone far even before any inquisition to protect an alleged lunatic and his property. It has punished persons entrapping an alleged lunatic into a marriage (see *Smart v. Taylor* (3)), it has restrained an alleged lunatic from executing instruments disposing of his property (*Ridgeway v. Darwin* (4)), and it has in quite recent times protected the property of an alleged lunatic against seizure by his creditors by appointing an interim receiver (*In re Pountain* (5)).

The statute *De Prerogativa Regis*, which has always been regarded as defining the power of the Crown in lunacy matters, has been very widely construed—e.g., it has been held to extend to a lunatic's personal property, although land and tenements alone are mentioned. But it is quite clear from Lord Eldon's observations in *Ex parte Hastings* (6) and *Ex parte Hall* (7), that the Court in Lunacy could not protect a lunatic from

(1) [1893] 3 Ch. 332.  
(2) [1895] 2 Ch. 799; [1896] 1 Ch.  
836.  
(3) (1724) 9 Mod. 98.

(4) (1802) 8 Ves. 65.  
(5) (1888) 37 Ch. D. 609.  
(6) (1807) 14 Ves. 182.  
(7) (1821) Jac. 160.

arrest under a ca. sa., and could not prevent a judgment creditor from issuing execution against his property if the creditor could reach it by ordinary writs of execution without interfering with the possession of an officer of the Court in Lunacy. This doctrine is as well settled now as it was then, as is shewn by *Brockwell v. Bullock* (1) and *In re Farnham*. (2) If, indeed, the creditor has done anything to give the Court in Lunacy jurisdiction over him, it is another matter: see *In re Weaver* (3), and other cases of that kind, noticed by Fry L.J. in *Brockwell v. Bullock*. (1)

We have looked to see whether the fact that the Judge in Lunacy can now sell a lunatic's real property for the payment of his debts enables the Court to compel creditors to come to that Court for payment, and to restrain them from pursuing their legal remedies against property not actually under the protection of someone appointed to take care of it. The power to sell the real property of a lunatic for payment of his debts was first given in 1830 by 11 Geo. 4, and 1 Will. 4, c. 65 (see ss. 28 and 30), and this power has been continued under later statutes ever since. But it has always been held, both before and since 1830, that the Court in Lunacy cannot compel a creditor to come in and prove his debt in lunacy by restraining him from issuing execution if he can do so without interfering with the officers of the Court. *Brockwell v. Bullock* (1) and the cases cited in it shew this to be the law now, as it always was. We can find no trace of the exercise by the Court in Lunacy of any such jurisdiction as we are referring to. We find a long course of decisions inconsistent with the possession of any such jurisdiction; and we are not prepared now for the first time to assert it. It would, we think, be wrong to creditors to do so, and not necessary for the protection of infants or lunatics, for an order for a receiver or an injunction can in an urgent case be obtained very summarily, and such an order affords all the protection which is really necessary.

It was contended that under s. 117 of the Lunacy Act the Court could sell the goods seized, they being the property of

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(1) (1889) 22 Q. B. D. 567.

(2) [1896] 1 Ch. 836.

(3) (1837) 2 My. & Cr. 441.

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the lunatic. But the Court could only sell the lunatic's interest in those goods; it could only sell them subject to the security of the execution creditor; and this would not benefit the lunatic in the present case. No doubt the Court could have directed the receiver to redeem the execution creditor's security by paying the judgment debt and the sheriff's charges, and then to sell the goods; but the Court was not asked to do this, nor did it appear that the receiver had money in her hands which she could have applied for such a purpose.

As soon, therefore, as the money is paid into court it ought to be paid out to the execution creditor, if the amount does not exceed his debt and costs. An order to that effect will be made by the master. The execution creditor is also entitled sooner or later to be paid the unpaid balance of his judgment debt and his costs of these proceedings out of the lunatic's property applicable to such payment; but the creditor must apply for such payment to the master, who will give the receiver proper directions on the subject. The receiver must also apply to the master for payment of her costs.

Solicitors: *Cunliffes & Davenport, for Cousins & Co., Cardiff; Carthew & Wheeler, for James Morgan, Cardiff; Fielder & Sumner, for William Jones, Cardiff.*

H. B. H.



LEEDS AND HANLEY THEATRE OF VARIETIES v.  
BROADBENT.

[1897 L. 2616.]

*Mortgage Deed—Construction—Proviso that Interest should be “punctually” paid.*C. A.  
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KEKEWICH  
J.

Dec. 10.

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—

A mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed, “if in the meantime every half-yearly payment of interest shall be punctually paid” :—

*Held*, by the Court of Appeal (reversing the judgment of Kekewich J.), that payment “punctually” meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment.

THIS was an action brought by the Leeds and Hanley Theatre of Varieties, Limited, in order to obtain a declaration that the defendants Leonard Broadbent and Ernest Carpenter were not entitled to require payment of principal moneys secured by an indenture of mortgage; or, alternatively, for rectification of the same indenture, and for an injunction to restrain the defendants from selling the premises comprised in the indenture, and from otherwise enforcing such indenture.

Early in the year 1897 the defendants, who were the owners of the theatre or music-hall now known by the name above mentioned, sold the same to the plaintiff company for 10,500*l.*, entering into an agreement that 7000*l.*, part of the purchase-money, should remain upon mortgage of the theatre. In pursuance of this agreement the plaintiff company executed to the defendants an indenture of mortgage dated February 15, 1897, whereby they covenanted with the defendants to pay to them on August 15 then next the said sum of 7000*l.*, with interest thereon in the meantime at the rate of 5 per cent. per annum, and also, as long after that day as any principal money remained due under the mortgage, to pay to the defendants interest thereon at the same rate by equal half-yearly payments on February 15

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and August 15 in every year. And the indenture also contained (amongst other provisions) an agreement "that payment of the principal money hereby secured shall not be required by the mortgagees or by any persons claiming under them until the expiration of three years computed from the date of these presents if in the meantime every half-yearly payment of interest shall be punctually paid."

The first half-yearly payment of interest under this deed having become due on August 15, 1897, and not having been paid, Leonard Broadbent on the following day, August 16, on behalf of himself and his co-mortgagee, wrote a letter to the secretary of the plaintiff company stating that this half-year's interest had become due the day before, and asking for a cheque for the amount by return of post. On August 17 the secretary wrote in reply acknowledging the receipt of that letter, and saying that it should be submitted to the directors at their meeting on Friday, August 20. On August 20 Broadbent again wrote to the secretary, saying that he and his co-mortgagee had consented not to call in the principal sum of 7000*l.* for three years if during that term every half-yearly payment of interest was punctually made, and as the conditions had not been complied with as to the interest due on the 15th, for the protection of himself and his co-mortgagee, he gave formal notice that they should, on the expiration of three months after date, require payment of the principal sum due upon the mortgage, with all interest which should then have accrued due thereon. The receipt of this letter was acknowledged by the secretary in a letter dated August 23, wherein he stated that it should be laid before his directors, and that a cheque for the interest would be drawn at their meeting on August 27. No payment having been made, Broadbent on August 24 wired, "Unless interest remitted to-day, shall issue writ to-morrow morning." The result of this wire was that a cheque for the interest was sent, not by the company, but by a gentleman who was a director of a trust company holding a second mortgage on the theatre. Broadbent, however, having intimated the intention of himself and his co-mortgagee to hold by their notice and to require payment accordingly, the plaintiff

company brought this action, and on December 10, 1897, moved before Kekewich J. for an injunction in the terms above mentioned.

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*Warrington, Q.C.*, and *Church*, for the plaintiffs. The word "punctually" in this proviso ought to be construed in a fair and reasonable way according to the ordinary understanding of business men, i.e., not as referring to any particular moment of time or any particular day or hour, but as meaning within a reasonable time. A payment of half-yearly interest on a mortgage debt made only nine days after the appointed day is a "punctual" payment in a business point of view, and within the ordinary meaning of language. There does not appear to be any authority directly in point.

*Bramwell Davis, Q.C.*, and *A. J. Allen*, for the defendants. The word "punctually" ought to be construed according to its natural meaning. The case of *Hicks v. Gardner* (1) is expressly in point, and covers this case. In that case there was an agreement to forego calling in a mortgage debt if interest was punctually paid; payment of interest was delayed for two or three days, and the Vice-Chancellor declined to grant an injunction to restrain proceedings at law to recover the debt. So in *Ford v. Earl of Chesterfield* (2) it was held that when a mortgagee agrees to take a portion of his debt in lieu of the whole upon payment on a given day, the Court will not relieve against the effect of its non-payment on that day, and it was said (3) that in cases of this kind it is "not so strictly proper to speak of time as being of the essence of the contract, as to say that time is the whole consideration for it." A mortgagee is entitled to have a condition of this kind construed strictly according to its meaning, the principle being that if the payment be not made modo et formâ the man who stipulated for it is entitled to be replaced in the position in which he was when the agreement which has been broken was entered into: *Thompson v. Hudson* (4), per Lord Hatherley L.C.: see also *Keene v.*

(1) (1837) 1 Jur. 541.

(3) 19 Beav. 434.

(2) (1864) 19 Beav. 428.

(4) (1869) L. R. 4 H. L. 1, 15.

C. A. *Biscoe* (1), commenting on *Langridge v. Payne* (2), and Fisher on Mortgage, 5th ed. p. 11.

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No reply was called for.

KEKEWICH J., after having dealt with other points raised, continued as follows:—I now come to a question of considerable nicety. The provision in the mortgage deed is that the money shall not be called in for three years if interest is “punctually” paid. It is insisted on behalf of the defendants that time is of the essence of the contract, or the whole consideration for it, and that “punctually” does not mean “unpunctually.” I quite agree with that, but to my mind the argument has run away from the real point. Of course, time is of the essence of the contract; but the question is, what time? What is the meaning in this proviso of the word “punctually”? When the true construction of the proviso is arrived at there is no difficulty in applying it. When it is ascertained what the time is there is no difficulty in saying that it is of the essence of the contract; but the whole difficulty is to say what the proviso means. The question is one of the meaning of language. No doubt “punctually” etymologically construed means “on the point,” i.e., at the exact time specified. In that sense a man who comes a minute too late is “unpunctual”; but in ordinary life, and in ordinary business transactions, a man would be considered to be punctual in keeping his appointment if he came within a short time after the exact moment of time appointed. It is not unusual in cases such as the present to find a period of as much as thirty days limited within which the payment of interest may be made, and in such case, on the expiration of the period, there could be no relief against default, and payment of the principal would be enforceable at once. But I am not prepared to say that the word “punctually” necessarily means on the particular day mentioned, or thirty, or two or three, or any particular number of days after. The question is whether the delay of nine days which has occurred in this case was an unreasonable delay. Subject to one case

(1) (1878) 8 Ch. D. 201.

(2) (1862) 2 J. & H. 423.

which has been cited to me, the question is a novel one, depending on the meaning of this word "punctually" when used, as it is here, in reference to half-yearly payments of interest under a mortgage deed. I think the word ought to receive a somewhat liberal construction. It would, I think, be pedantic to insist upon exact etymology and to fix upon the phrase "punctum temporis," and make that the test of the construction of an English instrument of this character.

But then it is said that the point has been decided, and that I am not at liberty to take my own view; and the case of *Hicks v. Gardner* (1) is referred to. That case, which is sixty years old, seems to be unlike the present case. It is difficult from the report, which is very short, to make out what the facts were. It would seem that there was a collateral agreement to forego calling in a principal sum if interest was punctually paid. That agreement, as I understand, was not between the debtor and creditor, but a collateral agreement by way of guaranty. The words of the agreement are not stated, and it may have been a very different agreement from that which is now before the Court. Then the argument for the plaintiff is given in the report, and two cases, to which I have referred, are cited. One is *Griffith v. Sheffield* (2); and, so far as I have been able to examine it, I am unable to see what application it had to *Hicks v. Gardner*. (1) It went on the question of waiver, and I cannot see that it affected the construction of a clause containing the word "punctually." *Seton v. Slade* (3), which the Vice-Chancellor in *Hicks v. Gardner* (1) declined to apply, seems to be even farther from *Hicks v. Gardner* (1) and the present case. There the question was whether specific performance could be decreed although the abstract was delivered too late. [His Lordship read the head-note.] That was the point throughout, though the report contains illustrations of what is meant by time being of the essence of a contract, but nothing was decided as between mortgagor and mortgagee, or which is applicable to a covenant such as was entered into in this case. *Hicks v. Gardner* (1)

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(1) 1 Jur. 541.

(2) (1758) 1 Eden, 73.

(3) (1802) 7 Ves. 265.



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seems to me to be an unsatisfactory case on which to ground any test, and I think I am entitled to put it aside and follow the bent of my own mind. In my opinion the word "punctually," used as it is in this proviso, does not mean on the very day specified, or within the very identical twenty-four hours. I think I am entitled to construe it as a man of business, and, so construing it, I am of opinion that, in the present case, the delay of nine days was not so unreasonable as to prevent the payment of interest from being made "punctually" within the meaning of the proviso, and that consequently the notice given by the defendants was bad. The result is that an injunction ought to be granted to restrain the defendants from acting on the notice.

C. C. M. D.

C. A. The defendants appealed, and the appeal was heard on January 11, 1898.

*Bramwell Davis, Q.C., and A. J. Allen, for the appellants.*  
*Warrington, Q.C., and Church, for the respondents.*

The arguments addressed to the Court of Appeal were similar to those reported above, and no additional authorities were referred to.

LINDLEY M.R. I do not think we need hear a reply in this case, for it appears to be exceedingly plain. All we have to do is to look at the mortgage deed. There is a covenant by the mortgagor to pay the mortgagees on August 15 next 7000*l.*, with interest at 5 per cent. If they did not pay on the 15th, an action could be brought on the 16th. It would be rather sharp practice, but legally such an action would lie. Then there is a proviso for redemption on payment "on the said 15th August"; afterwards comes this clause: "Lastly, it is hereby agreed that payment of the principal money hereby secured shall not be required by the mortgagees or by any persons claiming under them until the expiration of three years computed from the date of these presents if in the meantime every half-yearly payment of interest shall be punctually paid."

That surely means if, in the meantime, every half-yearly payment of interest is paid on the days specified in the covenant. I do not think you want authority to shew that "punctually" means punctually on the day fixed for payment; and I am not aware of any authority which shews it does not. According to the plain language, the mortgagees are in the right. The money was not paid on the day, nor for several days afterwards, and no attempt was made to provide for payment at all on August 15, when the first half-yearly interest became payable; and there being no sign of payment, the mortgagees served a notice calling in the money. Then, under the pressure of that notice, the interest is paid. Can it be right to say to the mortgagees, "You are not entitled to call in your money on the terms of this deed"? The bargain is in favour of the mortgagees. The mortgagors have only themselves to blame if they are put to inconvenience by neglecting to discharge their obligations according to the tenor of the instrument in which those obligations are expressed.

I think the learned judge below has gone too far in granting this injunction, and the appeal must be allowed with costs both here and below.

RIGBY L.J. I am of the same opinion, and have nothing to add on that part of the case which concerns the interpretation of the words. The parties must be taken to have meant what they have said; and there is no doubt whatever that, reading that as the real bargain between the parties, the privilege stipulated for was forfeited, and there was no waiver.

I think there is absolutely nothing in the suggestion either that there ought to be a rectification of the agreement entered into, or that you can find in the actual document anything in the nature of an equity to give a different meaning to the words "punctually paid."

VAUGHAN WILLIAMS L.J. I am of the same opinion.

Solicitors: *Goodale & Hobson, for Butterworth, Rose & Morrison, Swindon; G. B. W. Digby.*

W. W. K.

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THEATRE OF  
VARIETIES  
r.  
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KEKEWICH

J.

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Feb. 1.

## HOCKEY v. WESTERN.

[1897 H. 1435.]

*Mortgage—Mortgage of Share in Trust Fund—Right of Mortgagee to receive whole Amount of Share—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22, sub-s. 1.*

A member of a land society mortgaged his share in the society to the plaintiff (another member of the same society) by a deed to which the powers conferred by the Conveyancing Act, 1881, Part IV., were incident. The mortgagor died intestate, and there was no legal personal representative of his estate. A sum of money having become due to the mortgagor's estate from the society, the plaintiff, relying upon his power to give a receipt under s. 22, sub-s. 1, of the Act, claimed to have the whole amount paid to him as mortgagee. The trustees, however, not being furnished with an account and having reason to believe it questionable how much was due on the mortgage, offered to pay the plaintiff so much of the money as upon taking an account should be found due to him, but declined to pay him without such an account.

In an action by the plaintiff to recover the money from the trustees, it was held by Kekewich J., upon the authority of *In re Bell*, [1896] 1 Ch. 1, that the trustees were entitled to act as they had done; and, upon their undertaking to pay the money into court under the Trustee Act, 1893 (56 & 57 Vict. c. 53), the action was dismissed.

Upon appeal it was held by the Court that the trustees could not be said to have acted unreasonably; that the decision in *In re Bell* (of which their Lordships approved) was applicable; and that the judgment of Kekewich J. must be affirmed.

THE Southwark Freehold Land and House Property Association was constituted by an indenture dated March 1, 1882, and its objects as defined by that deed were to purchase or take land in England for the purpose of building, repairing, improving, selling, letting, or otherwise dealing with the same in such manner as the members of the society should at any meeting thereof direct, or in default of such direction as the trustees thereof should think proper. The deed also contained provisions for the dissolution of the society, and the division of its property equally between its members at the expiration of a period therein mentioned, which under powers in that behalf had been extended, until by a deed dated February 1, 1894,

the society was continued for a further period of five years from March 1, 1894.

The plaintiff Oliver Hockey and one Henry Cunningham Hay were both members of the society, and the defendants Western and others were the present trustees thereof. By an indenture dated September 24, 1889, Hay assigned all sums of money standing to his account in the society, and the value of his share and interest therein, to the plaintiff by way of mortgage to secure 600*l.* and interest. This deed did not confer any power of sale upon the mortgagee, or contain in express terms any receipt clause; and it contained a declaration that the statutory power of sale might be exercised, at any time after March 24 then next, without its being necessary to give the mortgagor any notice requiring payment of the mortgage money, in like manner as if s. 20 of the Conveyancing Act, 1881, had been omitted from that Act. By an indenture dated July 15, 1892, Hay further charged the same property in favour of the plaintiff to secure the further sum of 200*l.* and interest.

Hay died intestate on December 20, 1896, and no legal personal representative of his estate had as yet been constituted. Early in the year 1897 certain moneys became divisible amongst the members of the society in respect of which two sums of 300*l.* and 50*l.* were due to the estate of Hay. The plaintiff claimed these sums from the trustees of the society by virtue of his mortgage security, and, alleging that they had refused and neglected to pay them, brought this action against the trustees for the above amount, asking, in the alternative, to have the trusts of the indenture of March 1, 1882, administered by the Court. It appeared that on March 25, 1897, the trustees had passed a resolution to the effect that the two sums of 300*l.* and 50*l.* should be paid to the plaintiff, but only on the condition that he should give them an indemnity in the event of the assets of the association proving insufficient to meet any claim: the plaintiff, however, declined to give any such indemnity.

The defendants stated in their defence that they had received notice that the son of the late mortgagor, H. C. Hay, was winding up his father's estate; and they alleged that the plaintiff,

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although often requested so to do, had wholly refused to produce his mortgage deeds for their perusal and to furnish them with any account of the moneys owing in respect of his alleged mortgages or either of them; and they further stated that they were willing and had offered to pay to the plaintiff so much of the said sums of 300*l.* and 50*l.* as upon taking the accounts between mortgagor and mortgagee might be found to be due to him, and had also offered to pay the said sums upon receiving from the plaintiff a proper covenant of indemnity.

It appeared that the trustees had paid over all the moneys divisible except the share due to the estate of Hay.

The action was heard before Kekewich J. on November 12, 1897.

*Warrington, Q.C.*, and *A. Beddall*, for the plaintiff, contended that this was a case to which the statutory powers given to mortgagees by the Conveyancing Act, 1881, were applicable, and that under s. 22, sub-s. 1, of that Act (1) the receipt in writing of a mortgagee was a sufficient discharge for any money comprised in the mortgage or arising thereunder, and a person paying the same to a mortgagee was not concerned to inquire whether any money remained due under the mortgage. The plaintiff had this statutory power of giving a receipt for the whole 350*l.*, and it was the duty of the defendants to pay it over to him. [They endeavoured to distinguish the case from that of *In re Bell* (2) before the Court of Appeal.]

*Renshaw, Q.C.*, and *R. H. Spearman*, for the defendants.

[KEKEWICH J. I will not trouble you on the question of the meaning of the decision in *In re Bell*. (2) It may seem to require explanation, but it is the decision of the Court of Appeal.]

They contended that the defendants were entitled to refuse

(1) Sect. 22, sub-s. 1, of the Conveyancing Act, 1881, is as follows: "The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mort-

gage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage."

(2) [1896] 1 Ch. 1.



to hand over the money to the plaintiff until an account had been taken; and they undertook to pay the money into court to abide the result of an account.

*Warrington, Q.C.*, in reply.

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KEKEWICH J. If Mr. Henry C. Hay were the plaintiff in this action instead of Mr. Oliver Hockey, it seems to me that judgment in favour of the plaintiff would go as a matter of course. The defendants, as trustees of this association, are bound to pay on a proper receipt to each member of the association a sum of 350*l.*, reserving in their hands for future distribution more than enough, as has been proved, to answer all demands upon them as trustees. They have paid everybody else, and they would be bound to pay Mr. Hay; and if they had resisted that payment it seems to me he would have been entitled to judgment, including the costs of the action. Is Mr. Hockey entitled to the judgment which Mr. Hay would have had? In my opinion, no, because I think the decision of the Court of Appeal in *In re Bell* (2) prevents my saying "Yes." The criticism on that judgment by Mr. Warrington goes to this—that the right of a mortgagee to give a receipt stands so as to make a good discharge to the person making the payment—an insurance company or other stranger; but that it is competent to the insurance company or other stranger, a stakeholder or debtor, to raise questions about claims; and that if those claims are before them and there is a doubt whether the mortgagee is entitled to the money, then and then only must the stakeholder settle those claims. I cannot myself agree that the judgment of the Court amounts only to that. [His Lordship then commented on the language of the judgments in that case, and continued:—]

I am bound to recognise the decision of the Court of Appeal and to act up to it; if there is any qualification to be made I must leave the Court of Appeal to make it.

Now, what happened here was this. Mr. Hockey was clearly mortgagee of Mr. Hay's share. He had, by virtue of the Conveyancing Act or otherwise, a right to give a receipt to those who had to pay to Mr. Hay what was coming to him in respect

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of the shares in this association. The trustees, the defendants, certainly knew that there were possible questions affecting the amount payable to Mr. Hockey. They could not know more, because there was no legal personal representative; but the son of Mr. Hay, who probably was the person entitled to take out letters of administration, had raised questions, and the possibility that an account would shew that Mr. Hockey was not entitled to all that he required to be paid to him was before them. They knew, not that there was a question, but that there might be questions between those who represented Mr. Hay's estate and Mr. Hockey; and under those circumstances, or at least for that and other reasons, they declined, and do decline now, to pay Mr. Hockey. I think they are right in law according to the decision in *In re Bell*. (1) They are entitled to say, "We will pay what is found due to you on an account taken in the presence of the legal personal representative or assented to by him, and then the rest must be paid to that legal personal representative." Unfortunately, there is no legal personal representative, and as far as I can see at present there is no probability of there being one; but that does not seem to me to alter the position in the slightest, if my view of *In re Bell* (1) is right. I think that if the trustees had been well advised they would have paid the money into court, which it was quite competent for them to do; but I cannot say there was any obligation on them to do so, seeing that nobody ever suggested that they were making away with the money, or that it was not perfectly safe in their hands. Therefore Mr. Hockey's action fails on that ground. The money will be paid into court as arranged, and by-and-bye it can be paid out to the party entitled. So much for the merits.

[His Lordship then proceeded to deal with the question of costs. He held that the defendants, the trustees, were not justified in requiring, by their resolution of March 25, 1897, and subsequently insisting, that as a condition for his being paid the 350*l.* the plaintiff should give them an indemnity in the event of the assets of the association being insufficient to meet any claim, and further that there was no foundation for

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insisting on such an indemnity by their defence. His Lordship then proceeded :—]

I think the proper conclusion is that there should be no costs of the action ; but in so holding it must be noted that I am not administering the trust fund, and I must not be understood as expressing an opinion either way. I do not preclude the trustees from any claim against their own funds—the funds still retained—for the costs of the litigation which they have to bear as part of their costs, charges, and expenses. That is a question which may or may not arise hereafter. I say nothing about it. All I do now is to say that, the defendants undertaking to pay the 350*l.* into court to a proper title under the Trustee Act, 1893, the action will be dismissed and without costs.

G. I. F. C.

The plaintiff appealed. The appeal was heard on February 1, 1898.

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*Warrington*, *Q.C.*, and *A. Beddall*, for the appellant. This case is distinguishable from *In re Bell*. (1) In that case the amount of the share of the settled legacy which the mortgagee insisted on having paid over to him was much larger than, in fact, more than double, the principal money and interest due upon his mortgage ; and, moreover, the trustees had notice of a subsequent assignment and of adverse claimants. In *In re Bell* (1), therefore, the trustees had the right to have the adverse claimants before them, and it was their duty to settle the claims, for the notice converted the claimants into cestui que trusts. But here the nominal amount of the principal moneys secured is far larger than the sum payable in respect of the share, and there are no adverse claimants, and no persons other than the plaintiff with whom to settle. Accordingly the decision in *In re Bell* (1) does not apply.

*Renshaw*, *Q.C.*, and *R. H. Spearman*, for the respondents, were not called upon.

LINDLEY M.R. The case is one of considerable importance to trustees and mortgagees of equitable interests ; but I think

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it would be going too far to say that these trustees, in declining to hand over the money to the plaintiff, have acted so unreasonably that they ought to pay the costs of the proceedings.

I take the law to be as laid down by the Court of Appeal in *In re Bell*. (1) I have looked at that case, and I think the decision in it is absolutely right. The only question of any real importance is as to the effect of the 22nd section of the Conveyancing Act of 1881. [His Lordship then read that section, and continued:—]

Speaking generally, and shortly, that section is a statutory substitute for the power to give receipts which was commonly introduced into mortgages before 1881; and the effect of it must not be cut down. I take it to be quite plain that, after that section, trustees of funds, which are mortgaged and to which the Act applies, are perfectly safe in paying over the money to the mortgagee, and they are not concerned to inquire whether any money remains due under the mortgage or not.

If they act honestly and without notice of anything wrong they need not trouble themselves further about it. But if their suspicions are aroused, is it misconduct on their part to say—"We are not satisfied that we ought to pay over the money; there is an uncertainty as to our getting a proper discharge; there are circumstances which render it unreasonable to ask us to pay the money over to a mortgagee"? Supposing there are such circumstances, can the trustees be told that they must not pay the money into court, but must pay it over to the mortgagee, and be content with the discharge which he can give?

If that were so, it would create a revolution in the law relating to trustees. The case is gone the moment it is admitted that it can be decided as Kekewich J. decided it, and, in my view, very properly decided it. He said in effect: "I cannot come to the conclusion that there was any obligation on the trustees to pay over the money; and they would have been well advised, if they had paid the money into court which it was competent for them to do."

If there were any circumstances which made it reasonable

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for these trustees to decline to be satisfied with the statutory receipt, or if there was anything which justified them in taking the alternative course of paying the money into court, there is an end of this case. It appears to me unnecessary to do more than to observe the position these gentlemen were in. The plaintiff's mortgagor was dead, and there was no legal representative of his estate: the trustees of this fund knew perfectly well that some controversy had been raised by those who were interested in the estate of the mortgagor. It is enough for the trustees to say: "No doubt if we pay you we shall get a discharge from you, but we prefer to have the protection of the Court." The position taken up by the mortgagee is this: "I have a mortgage. I tell you that there is more due on it than the whole amount of the share you are paying over, and I stand on my strict rights under the Conveyancing Act, and require you to pay me." It would be going too far to say that the trustees were bound to do anything of that kind. There is nothing to justify the Court in depriving them of the costs to which they are entitled. I think the appeal must be dismissed, and dismissed with costs.

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RIGBY L.J. I am of the same opinion. I do not wish to throw any doubt on the efficacy of the receipt clause in the Conveyancing Act, or any other receipt clause in similar terms, when trustees have acted *bonâ fide*, and have had no reason to feel a doubt about what they ought to do. But it is one thing to say that they may take that receipt, and another thing to say that they must take it. I do not think the distinctions which have been attempted to be drawn between this case and *In re Bell* (1) are substantial. There the trustees knew that questions were being raised, and the mortgagees said, "It is no matter to you whether anything is due to the cestui que trusts or not; we are not going to render any accounts; we rely on our receipt clause, and we say it is obligatory to pay us the whole of the money whether anything is due on the mortgage or not." If, as the learned judge has found in this case, that it was reasonable, under the

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circumstances, that the trustees should pay the money into court, they were justified in what they did, and it seems to me to settle the question. Mr. Beddall says that his client could not make the trustees pay the money into court. But he could very easily have put the trustees in a wrong position if he had said, "Very well, pay it into court," and that suggestion had not been acted on. He did not choose to do so; but he comes here and asks the Chancery Division to order the trustees to do that which, if it were a trustee, it would not do itself. I think the trustees ought not to be made to pay the costs for taking a course which was not unreasonable under the circumstances.

This appeal is brought for the purpose of making the trustees pay the costs, and for no other purpose, and I think it must be dismissed.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors : *R. Chapman ; A. H. Procter.*

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# KAYE v. CROYDON TRAMWAYS COMPANY.

[1897 K. 882.]

*Company—Ultra vires—Sale of Undertaking—Compensation to Directors—Notice of Extraordinary Meeting—Sufficiency of Notice—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 71, 85, 86, 99.*

By a provisional agreement made between two companies for the sale of the undertaking of the one to the other, the purchasing company agreed to pay, in addition to the sum payable to the selling company, a substantial sum to the directors of the selling company as compensation for loss of office, and the agreement was made conditional upon its adoption by the shareholders of the selling company. The notice convening the meeting of shareholders to consider the agreement described it simply as an agreement for the sale of the undertaking. The selling company was governed by the Companies Clauses Act, 1845 :—

*Held*, (1.) that the provision in favour of the directors did not render the agreement ultra vires, but (2.) that the notice, by reason of its omission to refer to this provision, did not fairly disclose the purpose for which the

meeting was convened, and did not comply with s. 71 of the Companies Clauses Act.

*Southall v. British Mutual Life Assurance Society*, (1871) L. R. 6 Ch. 614, followed.

*Hutton v. West Cork Ry. Co.*, (1883) 23 Ch. D. 654, distinguished.

*Per* Vaughan Williams L.J.: *Seem*, if the money payable under this agreement to the directors was a bonus to them in consideration of their facilitating the contract, the agreement would not be binding upon a dissentient shareholder.

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THIS was an appeal from a decision of Kekewich J.

The action was brought by Major-General G. F. Kaye, on behalf of himself and all other the members of the Croydon Tramways Company except the defendants, against the company and its directors for a declaration that an agreement dated November 25, 1897, and made between the Croydon Tramways Company of the one part and the British Electric Traction Company, Limited, of the other part, for the sale of the undertaking of the tramways company to the traction company, and a resolution approving the same, purporting to have been passed at a meeting of the shareholders of the tramways company held on December 14, 1897, were ultra vires and ought to be set aside, and for an injunction to restrain the defendants from carrying out the agreement.

The plaintiff was the holder of 25*l.* ordinary stock in the tramways company.

The tramways company was incorporated by the Croydon Tramways Act, 1889, which incorporated the Companies Clauses Act, 1845, and Parts II. and III. of the Tramways Act, 1870, and the agreement in question was made under s. 44 of the last-mentioned Act. Clause 1 of the agreement provided for the purchase of the undertaking of the tramways company by the traction company, and the taking over by the traction company of all liabilities affecting the undertaking. Clause 2 provided as follows: "In consideration of the said sale the traction company shall on the completion thereof pay to the tramways company the sum of 30,543*l.* The traction company shall also pay the sum of 500*l.* to each of the present directors, other than Mr. W. J. Carruthers Wain, to whom the sum of 1250*l.* shall be paid, and 500*l.* to the

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secretary of the tramways company, as compensation for loss of office." Clause 6 provided as follows: "This agreement and all the provisions hereof are conditional upon the same being adopted by the shareholders of the tramways company; and in case of non-adoption . . . it shall be lawful for the traction company, by notice in writing to the tramways company, to determine this agreement." Clause 7 provided that a meeting of the tramways company should be forthwith held to consider the terms of the agreement. The seals of both companies were duly affixed to this agreement.

The sums payable to the directors and secretary of the tramways company under clause 2 of the agreement amounted in the aggregate to 3250*l*.

On November 26, 1897, notice was given by the tramways company of an extraordinary general meeting of the shareholders of the company, to be held on December 14, at the time and place therein mentioned, "for the purpose of considering, and if thought advisable of approving, the terms of an agreement to be made between the Croydon Tramways Company of the one part and the British Electric Traction Company, Limited, of the other part, being an agreement for sale of the undertaking and assets of the Croydon Tramways Company to the British Electric Traction Company, Limited." On December 1, 1897, the secretary of the tramways company sent out a circular to the several members of the company inclosing the notice of November 26, and also a form of proxy.

The circular stated as follows:—

"The object of the agreement is to carry out a sale of the undertaking and assets of the company to the British Electric Traction Company, Limited, at a price which will pay off the preference capital at par, and will return 60 per cent. to the holders of the ordinary stock. The traction company in addition assume the responsibility for the debentures and other liabilities of the company, and, as they are desirous of having the management in their own hands, the directors and the secretary have agreed to retire on being paid a lump sum as compensation for their loss of office. The near approach of the period at which the lines will become purchasable by the

local authority, and the heavy expenditure which is inevitable on the reconstruction and equipment of the lines for electrical traction, which the directors understand the local authorities make a condition precedent to any extension of the term, has led your directors to believe that the shareholders will be wise in accepting the present offer, and securing now for themselves what may be considered fairly satisfactory terms."

The circular concluded by a request that the inclosed form of proxy might be filled in and signed and returned to the secretary, in the event of the member not being able to attend the meeting.

On the receipt of this circular the plaintiff applied both by letter and in person to the secretary for further information as to the terms of the agreement, particularly with regard to the sums which were to be paid to the directors and secretary; but he did not succeed in obtaining all the information he required. At the meeting of the shareholders held on December 14 the chairman called attention to certain of the terms of the agreement, but did not read it, and a resolution approving the agreement was passed by a large majority, notwithstanding the opposition of the plaintiff. The plaintiff objected to the agreement on the ground that the provision for the remuneration of the directors and secretary was illegal, that the notice and circular did not fairly disclose to the members the nature of the agreement, and that the price was grossly inadequate; and on December 17, 1897, he issued the writ in this action, and served notice of motion for an injunction to restrain the defendants from carrying the agreement into effect. The motion was heard on January 11. Mr. Garcke, the managing director of the traction company, stated in an affidavit filed in opposition to the motion that the price was agreed upon before making any arrangement with the directors of the tramways company as to their remuneration; that even if no remuneration were to be given, the traction company would give no greater price for the undertaking; that it was originally proposed to take over the direction of the tramways company, but that the traction company preferred to be unfettered, and so made a compensation to the directors and secretary.

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Kekewich J. held, first, that the notice was not a sufficient compliance with s. 71 of the Companies Clauses Act, 1845 (1); and, secondly, that the agreement could not be upheld against a dissentient shareholder, inasmuch as it authorized payments for the compensation of the directors from which the company could derive no benefit. In his Lordship's opinion this point was covered by *Hutton v. West Cork Ry. Co.* (2) On the other hand, he thought there was no reason for impeaching the sale on the ground of undervalue. His Lordship granted an injunction.

The defendants appealed.

*Cripps, Q.C.*, and *Rowden (Warrington, Q.C.)*, with them, for the defendants. 1. The notice of the meeting is a sufficient compliance with s. 71 of the Companies Clauses Act, 1845.

2. The clause relating to the remuneration of the directors does not, in the absence of any concealment from the shareholders, invalidate the agreement: *Southall v. British Mutual Life Assurance Society*. (3) *Hutton v. West Cork Ry. Co.* (2) is distinguishable. There it was held that a company which had sold its undertaking and had ceased to be a going concern could not vote part of the purchase-money to its officials for compensation for loss of office, because such payments could not conduce to the benefit of a company which existed only for the purpose of the winding-up. But here the question is not as to the relative rights of the defendant company and its directors to the purchase-money, but as to the validity of the contract, which is admittedly beneficial to the company.

*Bramwell Davis, Q.C.*, and *Bradford*, for the plaintiff.

1. This agreement is bad inasmuch as the directors, who hold a fiduciary position towards the company, have in entering into a contract on behalf of their cestui que trust made a bargain with the purchasers for payment to themselves of an enormous

(1) Sect. 71 provides that "every notice of an extraordinary meeting, or of an ordinary meeting, if any other business than the business hereby or by the special Act appointed for ordinary meetings is to be done thereat,

shall specify the purpose for which the meeting is called."

(2) 23 Ch. D. 654.

(3) (1870) L. R. 11 Eq. 65, 72; (1871) 6 Ch. 614, 619.



sum to which they are not entitled. Having agreed to accept a bribe from the purchasers, they have put it out of their power to exercise an independent judgment as to the propriety of the contract: *Boston Deep Sea Fishing and Ice Co. v. Ansell*. (1) The money payable to the directors is part of the consideration for the sale, and ought to be paid to the company; and that being so, no majority can bind the minority to adopt this agreement: *In re George Newman & Co.* (2); *Hutton v. West Cork Ry. Co.* (3) Assuming that this agreement is capable of being adopted by the shareholders at a properly convened meeting, the true nature of the transaction has never been fairly disclosed to them. They have had no opportunity of seeing the agreement, and the circular purporting to explain its terms is misleading, as nobody reading that circular would suppose that the sum payable to the directors amounted to a considerable percentage of the whole of the purchase-money.

Apart from the general law, ss. 85 and 86 of the Companies Clauses Act, 1845, impose special obligations on directors, and shew that these directors were not competent to negotiate this contract. Under those sections directors who are personally interested in any contract are ipso facto disqualified; and we say that these directors vacated their office from the moment when the seal of the company was affixed to the agreement. They had, therefore, no power to convene a meeting of the shareholders, and consequently the agreement has not been accepted by a properly constituted meeting.

[LINDLEY M.R. Sects. 85 and 86 do not invalidate the contract, though they disqualify the directors: *Foster v. Oxford, Worcester and Wolverhampton Ry. Co.* (4)]

RIGBY L.J. I think that there was no contract until the shareholders adopted it.]

2. The notice is insufficient by reason of its omission to refer to the clause as to the remuneration of the directors. The proper and usual course is for the notice to state that the agreement is open to inspection.

[They also contended that under s. 44 of the Tramways Act,

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(1) (1888) 39 Ch. D. 339, 357.

(2) [1895] 1 Ch. 674, 686.

(3) 23 Ch. D. 654.

(4) (1853) 13 C. B. 200.

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1870, the company had no power to sell the undertaking upon the terms that the purchasers should take over the debts and liabilities, and upon this point they referred to *Marshall v. South Staffordshire Tramways Co.* (1)]

At the conclusion of the arguments on behalf of the plaintiff the Court directed the case to stand over for a fortnight, to give the plaintiff an opportunity of adding the purchasers as defendants, and serving notice of motion upon them, claiming the same relief as against the other defendants; and this was accordingly done. The hearing of the case was resumed on February 23.

*Bramwell Davis, Q.C., and Bradford*, for the motion.

*Buckley, Q.C., and Stewart-Smith*, for the traction company. The view of the purchasers was that it was reasonable that some compensation should be paid to the directors, whom they did not desire to take on to the board, in addition to the price to be paid to the company. That was a term added after the price was fixed, and it, therefore, does not affect the interests of the vendors. The purchasers were, however, particular to make this bargain, not with the directors, but with the shareholders; and, therefore, the agreement was made conditional upon their approval. If the Court is of opinion that this is an agreement which the shareholders can adopt, the purchasers are willing to complete; but if not, they will determine the contract.

With regard to the notice, the purpose of the transaction is sufficiently explained.

Whatever view may be taken of this arrangement with the directors, it cannot be regarded as the purpose of the transaction; that purpose is the sale of the undertaking. No doubt the provision in favour of the directors is part of the consideration, but it is not part of the consideration passing to the vendors: it is a condition to which they are bound to assent in order to obtain the benefit of the rest of the contract. But it has never been held that a notice of a meeting to consider an

agreement for sale must set out all the subsidiary clauses necessary for carrying out the sale. See per Mellish L.J. in *Southall v. British Mutual Life Assurance Society* (1), where a similar provision in favour of directors was treated as subsidiary.

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[LINDLEY M.R. The question of the validity of the notice was not raised in that case.]

A notice which states that the business of the meeting is to consider a particular agreement is good though it does not state the terms of the agreement.

[They also referred to *In re Bridport Old Brewery Co.* (2)]

*Bramwell Davis, Q.C.*, in reply, on the motion. *Southall v. British Mutual Life Assurance Society* (1) is distinguishable, because that was a transaction under s. 161 of the Companies Act, where any shareholder had a power of dissenting, and in that case the shareholders had an opportunity of seeing the agreement. (3) I rely on ss. 85 and 86 of the Companies Clauses Act as shewing that neither the buying nor the selling company could enter into this transaction. Those sections amount to a statutory prohibition against directors bargaining for their own benefit, and the purchasers must be taken to have had notice of that prohibition: *Ernest v. Nicholls.* (4) [He also referred to *Aberdeen Ry. Co. v. Blakie Brothers.* (5)]

*Cripps, Q.C.*, in reply. Sects. 85 and 86 are not in point, because there was no contract till the adoption by the shareholders; and s. 99 expressly guards against a contract being invalidated by the disqualification of the directors.

With regard to the notice, the notice is an advertisement in a public paper of the purpose for which the meeting is called. It does not profess to give a shareholder the information necessary to enable him to make up his mind how he ought to vote. That information must be supplied in some other way. Unless all the terms of the agreement are to be set out, there is no reason for setting out this particular clause as to the directors. If a meeting is convened for two purposes and one

(1) L. R. 6 Ch. 614, 620.

(3) See 40 L. J. (Ch.) 97.

(2) (1867) L. R. 2 Ch. 191.

(4) (1857) 6 H. L. C. 401.

(5) (1854) 1 Macq. 461.

C. A. only is set out in the notice, that would not be a good notice ;  
 1898 but here the only purpose of the meeting was the sale of  
 KAYE the undertaking. [He referred to *Grant v. United Kingdom*  
 v. *Switchback Rys. Co.* (1)]

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LINDLEY M.R. This case raises some questions of great importance, not only to the two companies involved in this present litigation, but to companies generally. The object of this litigation is, so far as it has gone at present, to restrain the Croydon Tramways Company and its directors, and the company which has since been joined, from carrying out a certain agreement for the sale of the Croydon Tramways Company to the purchasing company ; and Kekewich J. has granted an injunction restraining the Croydon Tramways Company and its directors from carrying out that agreement until the judgment in this action. He has done that on the ground that the agreement is what is called *ultra vires*—that is to say, one which any one shareholder in the Croydon Tramways Company can say the company had no right and no legal power to enter into. That raises a question of very great importance indeed. A subordinate question, but one also of very considerable importance, is this : whether, supposing Kekewich J. has gone too far in saying that this is a contract which the company cannot legally enter into, the shareholders have so assented to it and confirmed it as to render it presently operative, or whether the shareholders are entitled to say that, owing to the defective notice which has been given to convene the meeting to confirm it, it is not yet to be treated as a confirmed agreement. That turns ultimately upon the sufficiency of the statutory notice to which I will refer presently.

The agreement in question is sealed by both companies ; but owing to a clause in it, which I will read presently, it cannot be regarded as more than a provisional arrangement which was not to bind either of them until it was submitted to a meeting of the shareholders of the selling company. The agreement (I will call it an agreement for the sake of avoiding circumlocution) is dated November 25, 1897, and is made between the

Croydon Tramways Company of the one part and the British Electric Traction Company of the other part. Those are the parties to the contract, and the directors of neither company are mentioned as parties. [His Lordship referred to clauses 2, 6, and 7 of the agreement, and continued as follows :—]

Pausing there for a moment, it is obvious that the clause which I have read relating to the remuneration or payments to be made to the directors and the secretary is, to say the least, a very unusual clause, and it is not to be overlooked that what the agreement says is that the sums mentioned shall be paid to them as compensation for loss of office. Anybody reading this agreement without the light of Mr. Garcke's affidavit would not gather from that that what was meant was that the purchasing company had originally proposed to take over these gentlemen, and had subsequently arranged to give them this sum of money for not obtaining employment on the board of the purchasing company. Nobody would imagine that from reading this agreement by itself.

I will deal first with the question whether this is an invalid agreement in this sense—that if the two companies choose properly to adopt it, they cannot by law do so. It has been strenuously contended that it is an agreement ultra vires and an illegal agreement—an agreement illegal in the sense that the company cannot enter into it even if the shareholders wish it. I am not prepared to say that. I do not think there is any principle of law or any authority which goes that length. If the shareholders of the selling company choose on proper notice to confirm this agreement, I cannot conceive why they should not. Observe what it is. It is an agreement for the sale of the company's property upon terms which may or may not be advantageous. It cannot be fairly regarded as a mere agreement to pay the directors a certain sum of money. It is not like the case of *Hutton v. West Cork Ry. Co.* (1), where there was nothing to be done except to vote remuneration for the directors, and, the company being wound up, the Court said that that could not be done. The broad question to be considered here is whether, having regard even to that clause about

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payment of directors, the terms upon which it is proposed to sell the business of the Croydon Tramways Company are not so advantageous as that a majority of shareholders at a properly convened meeting can agree to accept them. The decision to which I have referred does not go anything like the length of saying that the shareholders cannot do so if they choose. *Southall v. British Mutual Life Assurance Society* (1), so far as it applies, comes nearest to this case. That goes to shew that this is an agreement which it is perfectly within the competence of these two companies to enter into. Counsel for the plaintiff based an argument on ss. 85 and 86 of the Companies Clauses Act, which, it is said, shew that in companies of this kind, at all events, such an agreement as this cannot possibly be valid. Sects. 85 and 86 are two of a group of sections headed "With respect to the appointment and rotation of directors," and it is enacted at the end of s. 85 that "No director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director." Upon that it is said that these directors are interested in this contract with the company, and that as they are not capable of being interested in a contract with the company, the contract itself must be beyond the powers of the company to enter into. That is putting upon s. 85 a construction which has never been put upon it for the last fifty years, and it appears to me inadmissible. The real truth is that the consequences of a director being interested in a contract with the company are as follows: First, there is the statutory consequence that he ceases to hold office; and, secondly, there is what I may call the general legal consequence, that he cannot enforce, as against the company, any contract which he has entered into with that personal interest. But to say that a contract between two companies is to be treated as invalid and beyond the power of one of the companies because one of the directors is interested in it, is a proposition which I have never heard advanced before, and which appears to me to be entirely unsound. That is the first and great point of this case—whether this is an agreement into which the

(1) L. R. 6 Ch. 614.

companies can validly enter; and upon that point I differ from the learned judge. My opinion is that it is a contract which they can lawfully enter into if they go the proper way to work.

That brings me to the next question. As I said before, this is not a contract at all until it has been approved by the shareholders. The language is: "This agreement and all the provisions hereof are conditional upon the same being adopted by the shareholders of the tramways company." What was done was this. This company being governed by the Companies Clauses Act, it was necessary to call a meeting in the manner prescribed by that Act for the purpose of obtaining the sanction of the shareholders of the Croydon Tramways Company to this agreement; and, accordingly, a notice convening a meeting was issued. The section in this Act of Parliament relating to these notices is s. 71. [His Lordship read the section and the notice, and continued as follows:—]

Now, what would anybody understand by that notice—anybody who was not behind the scenes, and did not know anything at all about the matter? He would understand from the notice that the meeting was convened for the purpose of considering a certain agreement for the sale of the undertaking and assets of the Croydon Tramways Company, and would assume as a matter of course that whatever the purchasing company was going to pay for the purchase of the undertaking and assets would be paid to the vendors—that is, would be paid to the selling company. That, however, is not true, because a very considerable portion of that which is part of the consideration for the purchase is not to be paid to the vendors, but is to be paid to the directors and officers of the selling company.

Now comes the question—to my mind a difficult question—whether, in ordinary fairness of language, one can say that this notice does, to use the words of the Companies Clauses Act, "specify the purpose for which the meeting is called." On behalf of the company it is argued that it does—that the purpose is to confirm the agreement. That, no doubt, is true by the card, but, in my opinion, this notice has been most artfully framed to mislead the shareholders. It is a tricky

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notice, and it is to my mind playing with words to tell shareholders that they are convened for the purpose of considering a contract for the sale of their undertaking, and to conceal from them that a large portion of that purchase-money is not to be paid to the vendors who sell that undertaking. I am perfectly alive to the danger of putting into notices, especially notices by advertisement, more than the Act of Parliament requires, and I agree that all that the Act of Parliament requires is that the purpose shall be stated. But it must be stated fairly: it must not be stated so as to mislead; and one of the main purposes of this agreement, so far as the directors care about it, is that they shall get a large sum of money without disclosing the fact to their shareholders. I do not think that this notice discloses the purpose for which the meeting is convened. It is not a notice disclosing that purpose fairly, and in a sense not to mislead those to whom it is addressed. It follows that, although in my judgment this contract is one which the companies can lawfully enter into, it is a contract which the selling company has not yet adopted—that is to say, the resolution which was passed under this notice is not one which is binding upon absent or dissenting shareholders.

[His Lordship then referred to the circular of December 2 which he thought was sent out in order to get proxies quite as much as to give additional information to the shareholders who should attend the meeting, and was not a full and fair disclosure of what was proposed to be done. He also commented upon the failure of the plaintiff to obtain any further information as to the agreement, and expressed his opinion that the directors of the selling company were extremely unwilling to disclose to the shareholders the terms of the clause relating to their remuneration; and he concluded as follows:—]

It appears to me, therefore, that the appeal succeeds to a certain extent and fails to a certain extent, and that the right course to adopt will be to discharge the order of Kekewich J., and to grant an injunction to restrain the defendant company from carrying this agreement into effect until duly sanctioned by the shareholders of the Croydon company at a meeting duly convened for the purpose. If they choose upon a proper notice,

understanding what they are about, to sanction this, in my judgment they are at liberty to do so; and there I differ from Kekewich J.

As regards the costs, the costs of the original plaintiff and the original defendants here and below ought to be costs in the action; and the costs of the additional defendants, the purchasers, who were served at our request, ought to be their costs in the action, so that they will not have to pay them, but may get them.

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RIGBY L.J. I am of the same opinion. First of all, this is a contract not ultra vires, according to my judgment. What is the meaning of an ultra vires contract? It is one which the company has no legal power to carry into effect at all, even although in the opinion of each and every shareholder it is a contract advantageous to the company and to them, and though each individual shareholder, being fully competent to agree for himself, approves of and agrees with it. I go so far as the language of James L.J. in *Southall v. British Mutual Life Assurance Society* (1) when he says, for the sole purpose of deciding whether the agreement was ultra vires, that it would be monstrous to say that a provision of the nature of that objected to here makes a contract ultra vires. I say nothing about the circumstances of that case except that the question was clearly raised both before the Master of the Rolls and the Court of Appeal, and was distinctly taken into consideration by James and Mellish L.JJ. in the Court of Appeal. Remembering that the question of ultra vires is not a question of comparison—not a question of being more or less advantageous, but a question whether, assuming the transaction to be most advantageous for the company, it is one which the company has a legal capacity of entering into, I do not see, after full consideration of the matter, how any other conclusion can be arrived at. In *Southall v. British Mutual Life Assurance Society* (1) the sums to be paid were 600*l.* to each director, and 5000*l.* to the secretary. If instead of that there had been comparatively a trifling sum—I do not mean to say so trifling

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that it could be absolutely neglected, but a sum one-tenth or one-twentieth part of that—the same reasoning on the question of ultra vires would have applied, and the Court would have been obliged to say that the mere insertion of such a clause in an agreement for sale and purchase of the undertaking would make it an impossible thing for the company to bind itself to perform. It seems to me that this agreement, if adopted by the shareholders of the company at a properly constituted meeting acting in a proper way, would not be ultra vires, and might be a very proper agreement. But then, upon the question whether in this case there has been sufficient notice to the shareholders and a sufficient approval at a general meeting duly convened for this purpose to constitute an adoption of the contract, first of all I would say, on that part of the argument which was founded on ss. 85 and 86 of the Companies Clauses Act, that the simple answer is this—that there was no contract at any time, there is not yet any contract, in which any director has any interest at all. If the notice given had been sufficient, and the meeting had been properly summoned and the resolution regularly and properly passed, when that resolution passed, and not before, would be the time when the contract arose.

Now, as to the actual notice, s. 71 of the Companies Clauses Act of 1845 provides that if there is to be a meeting of the company there should be notice by advertisement of the time and place of the meeting. Without going to the very words of the section, it provides that when there is business which we are accustomed to call special business to be conducted at the meeting there should be notice of the purpose for which the meeting is to be brought together. Now, I do not wish to add in any way to the section of the Act of Parliament, or to take anything from it. We have no right to do that, and if it can properly be said that the purpose of the meeting which is actually summoned is shewn in the advertisement, I do not think we have any right to impose upon the company or the board of directors the giving notice in detail of anything more than the purpose. The question that arises is, Was the purpose of this meeting fairly and in language that could be understood



by ordinary people disclosed? And I think it was not. They are told that the purpose for which they are assembled is to consider, and if thought fit to adopt, a contract for the sale of the undertaking of the company to the British Electric Traction Company. That did disclose one purpose, but not the whole purpose; and it is too clear, I think, for argument, that if there are several purposes, then the notice will not be sufficient in respect of any purpose which is not indicated in the notice at all. There may be a sufficient notice for one purpose, and not for another. I quite agree with what the Master of the Rolls has said, that no man of business would ever come to the conclusion that when a meeting was summoned for the purpose of sanctioning a sale from the company to a purchaser it was also intended at that meeting to do so different a thing as to sanction the payment of part of the consideration that was to proceed from the purchaser, not to the company, but to the directors of the company. I am bound to say that I think the directors went entirely wrong in the course that they adopted. They may have wished that the public should not know of this payment to themselves: that might be one motive; but I cannot help thinking that they also wished that the shareholders should not have it called too clearly to their minds that such a payment was to be made. I cannot think that the notice actually given was either literally or in spirit within the meaning of s. 71. I do not mean to say that it is necessary by notice to give full information as to the nature of the business to be transacted; but you must give, at any rate, a fair and candid and reasonable explanation of the purpose or purposes, whatever they may be, for which the meeting is summoned. I do not think it necessary to say anything about the form of the circular, though I agree with what the Master of the Rolls has said as to that also. It is far from being a candid disclosure of what was proposed. I do not say anything either about the proceedings at the meeting beyond this—that I am not satisfied that even then there was a full and proper disclosure. It is not upon these points that I found my judgment. My opinion is that the notice actually advertised did not disclose the purpose—as distinguished altogether from the

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1898 related to the payment of these officials of the company.

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VAUGHAN WILLIAMS L.J. I am of the same opinion. With regard to the question whether the agreement contemplated in this case was *ultra vires* or not, I have not a word to add. With regard to the insufficiency of the notice—the advertisement—the notice was misleading. In my judgment this meeting was in substance called for two purposes, and the notice of meeting was intentionally so framed as to call the attention of the shareholders to one only of those two purposes. But I wish to say one or two words upon another part of the case.

Kekewich J., in dealing with this case, held that the notice was insufficient as one of the grounds upon which he acted. So far as he so held, this Court is not differing from him. Then it is said that another ground acted upon by the learned judge was that the entering into such a contract was *ultra vires* of the company. I am not quite sure that the learned judge meant so to decide, although he may have said some things in the judgment which point in that direction. It is plain that if you speak of something as being *ultra vires* of the company, and something else as being *ultra vires* of the directors or officers of the company, you have not exhausted all the possible cases, because there is another case which may arise, and frequently does arise, that is to say, the majority of the shareholders meet together, and they by resolution purport to bind the minority to do something as to which it is not competent for the majority to bind the minority. Now, such a resolution is not *ultra vires* in the sense in which that word is properly used—it is not *ultra vires* in the sense in which counsel for the plaintiff asked us to say that the words of ss. 85 and 86 of the Companies Clauses Act made this resolution *ultra vires*, because when anything is *ultra vires* in that sense the vote of all the shareholders, every one of them who were present assenting, would not make the matter one which it was competent for the company to carry through. There is another sense in which it might be said that a matter was *ultra vires* which is not *ultra vires* in the proper

sense of the words "ultra vires of the company," nor ultra vires in the much more limited sense of the words "ultra vires of the directors," but ultra vires of the majority of the shareholders.

The reason why I have mentioned this matter now in giving judgment in this case is this—that a great deal has been said about the decision of the Court in *Southall v. British Mutual Life Assurance Society* (1), and it has been suggested that Lord Romilly M.R. and James and Mellish L.JJ. respectively decided that there was nothing which would render invalid a resolution of the majority of the shareholders giving a bonus to the servants of the company, never mind what was the motive of giving the bonus. I do not think myself that *Southall v. British Mutual Life Assurance Society* (1) decides anything of the sort. James L.J. in dealing with this matter says: "I agree that if this had been done secretly, in all probability it could not be supported. But it was done openly, and appeared on the face of the agreement. There was nothing in itself wrong in such an arrangement, and it was known to all the shareholders. They said: 'We are going to get rid of the chairman and the directors, and we think it right that we should give them some compensation.' It would be monstrous to say that a transaction otherwise reasonable could be vitiated by such a clause as this." Now, all that I understand that the Lord Justice is saying there is that, if the circumstances are such as not to import any impropriety in the gift which is being made by the resolution of the shareholders of the company to its officers, there is no reason why that resolution should be treated as an invalid resolution. But if such a resolution had been passed under different circumstances—say, for example, under circumstances which would leave it beyond a doubt that the directors in entering into the contract with the purchasers (for there were purchasers in that case, or an amalgamating company, which is the same thing) had been actuated by the desire to carry through the contract, not because of the benefit which would result to the company therefrom, but because the term of the contract which provided for the

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payment to them of this money operated as a bribe to induce them to negotiate the contract irrespective of its benefit to the company—I do not understand the Lord Justice to mean that in such a transaction the majority could bind the minority. I am anxious to say that in this case, because this action has not been tried yet. It may turn out when the facts are ascertained that this contract which was thus negotiated between the Croydon Tramways Company and the traction company was a contract altogether advantageous to the Croydon Tramways Company. It may turn out that in truth and in fact there was some arrangement whereby the purchasing company undertook to employ the directors, and that changes had been made at such a time and under such circumstances as would account for the purchasing company making this payment to them. I hope it may turn out to be so. But it may turn out that in truth and in fact the traction company was willing to pay directly to the Croydon Tramways Company a larger sum by the very amount which it is provided should be given to these directors.

Looking at the matter as a mere matter of business, I confess that I should always be very slow to believe that a purchasing company was not willing to give the selling company the full amount that it was prepared to pay by the terms of contract entered into at the time of making the purchase, irrespective of whether it was to go into the coffers of the company or into the pockets of the directors. I cannot help thinking that anybody familiar with business would be very slow to believe that the purchasing company was willing to pay what in effect is a larger price if the money went into the pockets of the directors, than it would have been willing to pay if it went into the coffers of the company. If it does in fact turn out that this money was really a bonus given by the purchasing company to the directors of the selling company, in consideration of the directors of the selling company facilitating the contract, I wish to say emphatically on my part that, in my opinion, there is nothing in the decision in *Southall v. British Mutual Life Assurance Society* (1) which says that the majority of the

(1) L. R. 6 Ch. 614.

shareholders can bind the minority in respect of such a matter as that.

I do not want to go in detail into a case which in many respects is different from the present case, but I understand that Fry L.J. and the majority of the Court of Appeal in *Hutton v. West Cork Ry. Co.* (1), although deciding the case upon another ground, that is to say, upon the ground that the company there had already gone into liquidation, do one and all affirm this proposition which I have been attempting to state here—that is, that there are matters which are *intra vires*, but yet are of such a character that the majority cannot bind the minority, even though the notice might itself be in due form.

In this case I wish further to add that, although these matters might not affect the rights of a stranger generally, the traction company here is not in the position of a stranger, because the very terms of the contract which was proposed to be sanctioned by the meeting of the shareholders of the selling company conveyed notice to the purchasing company that the transaction was of such a character that the onus really would lie upon that company of shewing that the payment to the servants of the selling company was a payment of an innocent and justifiable nature.

[It was arranged that in the event of the agreement being sanctioned by a further meeting of the shareholders the money payable to the directors of the selling company should be paid into court.]

Solicitors: *Hugh C. Godfray; Walter Webb & Co.; Sydney Morse.*

(1) 23 Ch. D. 654.

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[1897 J. 2089.]

Jan. 18, 19, 28.

*Partnership—Action for Dissolution—Compromise—Sale of Business to one Partner—"Assets"—Goodwill—Canvassing old Customers.*

A. and B. had formerly carried on business in partnership, and B. had brought an action for rescission of the partnership on the ground of misrepresentations by A. This action was compromised on the terms that judgment should be entered for B. for 1200*l.*, the partnership to be dissolved, A. retaining the "assets." The goodwill was not specifically mentioned in the terms of the compromise. A. subsequently brought another action to restrain B. from canvassing the customers of the old firm. Upon motion for an interlocutory injunction :—

*Held*, that the relations of vendor and purchaser existed between the parties, that B. was subject to the ordinary obligations of a vendor, and that consequently, upon the authority of *Trego v. Hunt*, [1896] A. C. 7, A. was entitled to an injunction.

*Gray v. Smith*, (1889) 43 Ch. D. 208, and *Pearson v. Pearson*, (1884) 27 Ch. D. 145, considered.

THIS was a motion for an injunction to restrain the defendant from canvassing the customers of a business formerly carried on by the plaintiff and defendant in partnership. The partnership was entered into under articles dated January 20, 1896. In February, 1897, the present defendant commenced an action against the present plaintiff in the Queen's Bench Division, claiming a rescission of the partnership and damages on the ground of certain misrepresentations made by the present plaintiff to the present defendant. That action came on for trial on November 22, 1897; but before the case was opened, it was compromised on the terms stated in the following certificate, which was filed in the Queen's Bench Division :—

"By consent the judge directed that judgment should be entered for the plaintiff for 1200*l.*, to include costs, on the following terms :—

"All charges of fraud withdrawn, the plaintiff to be indemnified as to all debts of the partnership, the partnership to be dissolved, the defendant retaining the assets and allowing the plaintiff fourteen days to remove from the premises. The

other action to be dropped. This in full settlement of all disputes." STIRLING J.

Subsequently the defendant issued a circular to the old customers of the firm, stating that he intended to commence business, and asking for orders; and thereupon the present action was brought.

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*Rashleigh*, for the plaintiff. This case is covered by *Trego v. Hunt* (1), and the plaintiff is entitled to an injunction. The transaction amounts to a voluntary sale by the defendant of his share in the business, including the goodwill, and he may be restrained from acts by which he expressly seeks to restore the goodwill to himself.

*Butcher, Q.C.*, and *Daniel Jones*, for the defendant. An agreement for dissolution of a partnership with a stipulation that the retiring partner shall allow the continuing partner to retain the assets will not prevent the retiring partner from soliciting the customers of the old firm. There is no authority precisely in point; but the goodwill which passes under an agreement by one partner to take over the partnership assets from the other is of an extremely limited character, and places the retiring partner under no restriction as to carrying on business in the same place: *Kennedy v. Lee*. (2) Such an agreement is not equivalent to an express agreement for the sale of the goodwill: *Gray v. Smith*. (3) Further, where a sale is ordered by the Court on a dissolution, a clause is always inserted reserving to the former partners the right to carry on the like business: *Hall v. Barrows* (4); *Johnson v. Helleley* (5); and see *Pawsey v. Armstrong*. (6) It may be that an express sale of the goodwill on a dissolution without any restriction would carry with it the right to prevent the former partners from soliciting the customers of the old firm; but that is not this case, and it is submitted that *Trego v. Hunt* (1) is confined to cases where the goodwill is expressly mentioned.

The effect of *Trego v. Hunt* (1) was to restore *Labouchere v.*

(1) [1896] A. C. 7.

(2) (1817) 3 Mer. 441, 452.

(3) 43 Ch. D. 208.

(4) (1863) 4 D. J. & S. 150; 10

Jur. (N.S.) 55.

(5) (1864) 2 D. J. & S. 446.

(6) (1881) 18 Ch. D. 698, 709.

STIRLING J. *Dawson* (1), which had been overruled by *Pearson v. Pearson* (2); but although Lord Romilly's decision remained unquestioned from 1872 till 1884, no case can be found in which the principle of that decision was applied except where the goodwill was expressly sold. We therefore submit that *Trego v. Hunt* (3) and *Labouchere v. Dawson* (1) are distinguishable from the present case.

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In the case of the sale of a bankrupt's business by the trustee in bankruptcy, the purchaser cannot restrain the bankrupt from canvassing his old customers: *Walker v. Mottram* (4), where it was pointed out that the obligation enforced in *Labouchere v. Dawson* (1) was a purely personal obligation, and not a mere incident to the transfer of property.

The old authorities are still applicable.

[STIRLING J. As I understand the decision in the House of Lords, the old authorities, so far as they establish that a man who has sold the goodwill of a business is at liberty to set up a new business next door, are not disturbed.]

The old authorities have exactly the same effect as before *Labouchere v. Dawson*. (1) *Trego v. Hunt* (3) was not intended to upset any previous authority, or to modify in any degree the existing law except as to *Pearson v. Pearson*. (2) It merely applied very old principles to a new state of circumstances.

The question here is, What is the effect of the assignment of the "assets"?

[STIRLING J. You must shew that "assets" does not include goodwill in the sense in which it was used in *Trego v. Hunt*. (3)]

*Cook v. Collingridge* (5) is an authority on that point, and is not touched by *Trego v. Hunt*. (3) Lord Eldon's view has been uniformly acted upon down to the time of *Labouchere v. Dawson* (1), and since.

The authorities are summarised in Lindley on Partnership, 6th ed. p. 442.

[They also referred to *Dawson v. Beeson* (6), *Ginesi v. Cooper & Co.* (7), and *Leggott v. Barrett*. (8)]

(1) (1872) L. R. 13 Eq. 322.

(2) 27 Ch. D. 145.

(3) [1896] A. C. 7.

(4) (1881) 19 Ch. D. 355.

(5) (1825) 27 Beav. 456.

(6) (1882) 22 Ch. D. 504.

(7) (1880) 14 Ch. D. 597.

(8) (1880) 15 Ch. D. 306.

*Rashleigh*, in reply. None of the cases cited as to goodwill STIRLING J. refer to the soliciting of custom. If any goodwill whatever passed to my client by the judgment of the Queen's Bench Division, that gives him the right to prevent the defendant from soliciting the customers. The House of Lords, in *Trego v. Hunt* (1) have preserved a very small part of the right attached to goodwill, and that part I submit the plaintiff is entitled to have secured to him. In *Kennedy v. Lee* (2) the contract was very special. In *Gray v. Smith* (3) there was merely an agreement to withdraw from the partnership, and there was no mention of goodwill. That case only decided that where there is such a contract the remaining partners shall not use the name of the retiring partner so as to subject him to liability. So also in *Rolt v. Bulmer* (4) and *Hall v. Barrows* (5) the word "goodwill" did not occur.

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[STIRLING J. referred to *Page v. Ratcliffe*. (6)]

In *Trego v. Hunt* (1) a distinction was drawn between the particular right now claimed and the question of setting up a similar business.

[STIRLING J. What do you say about *Pearson v. Pearson* (7)?]

In *Pearson v. Pearson* (7) there was express language in the contract by which the purchaser was warned that the vendor was going to complete.

[STIRLING J. Supposing that the words had been, "This agreement shall not prevent J. P. from carrying on a like business"—almost the very words in *Johnson v. Helleley* (8)—and the effect of that qualification in express terms is to prevent the purchaser from getting the injunction, why is the qualification which the law implies not to have the same effect?]

The effect of the compromise is that my client is to retain the assets.

[STIRLING J. "Assets" there includes everything that the partner could have been compelled to convey to the purchaser

(1) [1896] A. C. 7.

(5) 4 D. J. & S. 150; 10 Jur.

(2) 3 Mer. 441, 452.

(N.S.) 55.

(3) 43 Ch. D. 208.

(6) (1896) 75 L. T. 371.

(4) W. N. (1878) 119.

(7) 27 Ch. D. 145.

(8) 2 D. J. & S. 446.

STIRLING J. if the partnership had been dissolved by a hostile order of the Court and the partner had been ordered to convey.]

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This partnership has not been dissolved by an order of the Court, but there has been a sale by the defendant of his share to the plaintiff, and that puts the plaintiff in the position of a purchaser. The word "assets" sufficiently includes goodwill so as to prevent the defendant from taking away part of the property of the partnership.

[STIRLING J. How do you reconcile that with *Pearson v. Pearson* (1), so far as it is unaffected by *Trego v. Hunt* (2)?]

*Pearson v. Pearson* (1), so far as it was independent of *Labouchere v. Dawson* (3), was decided upon an express proviso in the contract authorizing the defendant to carry on business. Such a proviso will not be read into the present case, because it is not a sale by order of the Court, as in *Johnson v. Helleley* (4), but a voluntary sale. The decision in *Trego v. Hunt* (2) prevents the right to set up a similar business from being construed as including a right to solicit the customers of the old business.

*Cur. adv. vult.*

Jan. 28. STIRLING J. (after stating the facts). The injunction is claimed upon the authority of *Trego v. Hunt* (2), in which it was established that where the goodwill of a business is sold (without further provision) the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser. The obligation to refrain from canvassing the customers arises out of the relation of vendor and purchaser. Thus Lord Macnaghten says (5): "The principle on which *Labouchere v. Dawson* (3) rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate

(1) 27 Ch. D. 145.

(2) [1896] A. C. 7.

(3) L. R. 13 Eq. 322.

(4) 2 D. J. & S. 446.

(5) [1896] A. C. 25.



the thing which he has sold; there is an implied covenant, STIRLING J.  
 on the sale of goodwill, that the vendor does not solicit the  
 custom which he has parted with: it would be a fraud on  
 the contract to do so. These, as it seems to me, are only  
 different turns and glimpses of a proposition which I take  
 to be elementary. It is not right to profess and to purport to  
 sell that which you do not mean the purchaser to have; it is  
 not an honest thing to pocket the price and then to recapture  
 the subject of sale, to decoy it away or call it back before the  
 purchaser has had time to attach it to himself and make it his  
 very own." Observations to the like effect are made by Lord  
 Herschell (1) and by Lord Davey. (2)

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The source of the obligation is well shewn by the decision in *Walker v. Mottram* (3), where it was held that a bankrupt, the goodwill of whose business had been sold by the trustee in his bankruptcy, could not be restrained from setting up bonâ fide a fresh business and soliciting the customers of his former business, not because the goodwill of a business sold by a trustee in bankruptcy differs from that sold by a solvent man, but simply because the bankrupt is not the vendor, and consequently is under no liability towards the purchaser. That that was the ground of the decision appears from the judgment of Lush and Lindley L.JJ. in the Court of Appeal, and it is also pointed out by Lord Macnaghten in *Trego v. Hunt* (4): where he expresses approval of the decision, saying: "There is all the difference in the world between the case of a man who sells what belongs to himself, and receives the consideration, and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, expressed or implied, to the purchaser from the trustee."

The first thing, therefore, to be considered is whether the relationship of vendor and purchaser exists between the plaintiff and defendant in the present case; and in my opinion this question must be answered in the affirmative. The judgment is one which amounts to a sale by the defendant to the plaintiff. It is expressed to be judgment for 1200*l.* by consent, upon

(1) [1896] A. C. 21.

(2) *Ibid.* 29.

(3) 19 Ch. D. 355.

(4) [1896] A. C. 23.

STIRLING J. terms one of which is that the present plaintiff should retain all the assets, and that the defendant should retire from the business. The case is not to be treated as one of compulsory dissolution by the Court and a sale following, but of an agreement for dissolution by mutual consent upon the terms expressed in the certificate; and I think, therefore, the case is substantially one in which the defendant sold all his interest in the assets to the plaintiff for 1200*l.*; and, indeed, this was not disputed by the defendant.

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The next point which has to be considered is whether the defendant must be regarded as the vendor of the goodwill. What the certificate speaks of is "the assets" of the partnership; the goodwill is not expressly mentioned. It was not disputed that the word "assets" includes the goodwill so far as it constitutes property; but it was contended that the defendant was not such a vendor as to give rise to the obligation on which the plaintiff's title to an injunction rests. Now the word "assets" is a compendious expression for the aggregate of the several items of property belonging to the partnership. An agreement for the sale of such assets would in most cases bear the same construction and have the same effect as if the several items of property were specifically enumerated either in the body of the agreement or in a schedule annexed to it. There are, however, two cases binding on me which are said to establish that this is not so in every case; and on these the arguments addressed to me were rested, and they deserve careful examination.

The first is *Gray v. Smith*. (1) There three partners named Gray, Smith, and Bennitt carried on business under the style of Gray, Smith & Bennitt. A memorandum of agreement in the following terms was signed by the defendant Bennitt: "Rough draft. Memorandum from Gray, Smith & Bennitt. This is to record that in consideration of William Gray or his executors paying H. C. Bennitt or his assigns the sum of 100*l.* on January 1, 1890, and the sum of 100*l.* on every 1st of January for the nine succeeding years, H. C. Bennitt agrees to withdraw from the firm of Gray, Smith & Bennitt." It was

(1) 43 Ch. D. 208.

held that that memorandum contained all the essential terms of an agreement for a dissolution of the partnership, including a stipulation that the retiring partner should assign his share in the assets. It was nevertheless held that the plaintiff had no right to continue the name of Bennitt in any way which might subject him to further liability. STIRLING J.

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The judgment of the Court of Appeal is thus stated by Cotton L.J. (1): "The appellant says, 'I take all the property of the firm, the goodwill is part of that property, and includes the use of the name of the firm.' We must look to the contract and see whether there is any stipulation to assign the goodwill. A contract to retire from the firm has not the same effect as a contract expressly bargaining for the assignment of the goodwill. The agreement by Bennitt to withdraw from the firm entitles the plaintiff to an assignment of Bennitt's share of the stock, but does not imply that the plaintiff is to be at liberty to continue to use Bennitt's name." Then he refers to *Levy v. Walker* (2), where there was an agreement for the sale of leasehold premises, trade fixtures, stock-in-trade, goodwill, and business as a going concern to Miss Walker, and Cotton L.J. says: "That was quite different from the present case, where there is only an agreement by a partner to retire from the firm. In that case it was held that the contract for sale of the goodwill included a right to use the name of the firm. Here there is no such contract." Bowen and Fry L.JJ. concurred, but they did not add anything to that judgment, and the decision is based on the ground that a contract for the sale of assets had not under the circumstances, the same effect as if the goodwill had been expressly mentioned.

The other case is *Pearson v. Pearson* (3), in which it was decided by the majority of the Court of Appeal that a vendor of goodwill cannot be restrained from canvassing his former customers. So far as the decision was based on this ground, *Pearson v. Pearson* (3) is now overruled by *Trego v. Hunt* (4); but the decision was also based on another ground, in which all the members of the Court agreed, and this ground is said to

(1) 43 Ch. D. 220.

(2) (1879) 10 Ch. D. 436.

(3) 27 Ch. D. 145.

(4) [1896] A. C. 7.

STIRLING J. apply to the present case. There the plaintiff and defendant were interested in a business respecting which an action and a cross-action were pending between them. An agreement for a compromise of those actions was entered into, of which the following were the material clauses :—

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“1. Theophilus Pearson shall pay to James Pearson 2000*l.* for the purchase of his estate and interest in the property and business to which these actions relate, 500*l.* to be paid on the signing hereof and 1500*l.* on completion. . . .

3. Nothing in this agreement shall be deemed to restrict or prevent the said James Pearson carrying on and exercising the business of a potter and earthenware manufacturer or any other businesses at such place as he thinks fit, and under the name of James Pearson.”

Subsequently James Pearson issued a circular to the customers of the business, and an application was made for an injunction. It appears to have been held by all the members of the Court of Appeal that, whether or not the doctrine now established by *Trego v. Hunt* (1) was well founded, the defendant was entitled to canvass the old customers by virtue of the stipulation contained in clause 3 of the agreement. It is necessary, however, to look somewhat closely at the judgments which were delivered on this point. Baggallay L.J. says (2) : “If the first clause of the agreement . . . stood alone I should be of opinion that the sale included the defendant’s interest in the goodwill, and I will first deal with the case as if that clause stood alone. Treating the case as a simple sale of the defendant’s interest in the goodwill, then if *Labouchere v. Dawson* (3) is to be treated as laying down the law correctly, the plaintiff is entitled to obtain his injunction.” The Lord Justice then went on to discuss *Labouchere v. Dawson* (3), and came to the conclusion that it did not lay down the law correctly. Later on he adds (4) : “But assuming the first clause, taken per se, to amount to a sale of the goodwill, are not its consequences modified by clause 3? That clause, which expressly gives the defendant a right to carry on any business

(1) [1896] A. C. 7.

(2) 27 Ch. D. 152.

(3) L. R. 13 Eq. 322.

(4) 27 Ch. D. 154.

wherever he pleases under the name of James Pearson, appears STIRLING J.  
to me to have an important bearing on the case, and having  
regard to its terms I think that, even assuming *Labouchere v.*  
*Dawson* (1) to be right, the defendant has done nothing which  
would entitle the plaintiff to the second branch of the injunc-  
tion." I read the first passage which I have cited from that  
judgment as an expression of opinion by Baggallay L.J. that if  
the view of the law contrary to that expressed by him was correct  
(and it is now established by *Trego v. Hunt* (2) to be correct) the  
plaintiff is entitled to his injunction. Cotton L.J. says (3): "It  
is said that there was a sale of the goodwill, and according to  
the proper meaning of the word 'goodwill' I think that there  
was. . . . But the word 'goodwill' is not used, and when a  
contract is sought to be implied we must not substitute one  
word for another. Such a right as is here contended for might  
be inferred from a contract to sell the 'goodwill,' and yet not  
be inferred from such a contract as we have here." I gather  
from that that the Lord Justice did not agree with the view  
expressed by Baggallay L.J. as to the effect of clause 1 of the  
agreement standing alone. He then came to the conclusion  
that *Labouchere v. Dawson* (1) ought not to be followed, and  
added (4): "But the present case is less favourable to the  
plaintiff than that case, for not only have we no contract  
against carrying on the business, but clause 3 shews it to have  
been in the minds of the parties that the defendant should  
carry on business, and I think that this stipulation entitles him  
to get customers in any fair way of managing his trade."  
Lindley L.J. says (4): "By the agreement James Pearson gives  
up all his interest in the business for 2000*l.* Pausing there,  
although the goodwill is not in terms mentioned in the agree-  
ment, I think that it is included, for a man who sells all his  
interest in a business cannot retain any interest in the good-  
will." Now, although Lindley L.J. does not use the same  
definite language as Baggallay L.J., I read that as an expres-  
sion of agreement with him to that extent on the effect of the  
original clause. Then he refers to clause 3, and says: "That

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(1) L. R. 13 Eq. 322.

(2) [1896] A. C. 7.

(3) 27 Ch. D. 155.

(4) *Ibid.* 158.



STIRLING J. is an important stipulation, which obviously was introduced for the benefit of James Pearson. By it he says, in substance, 'Though I have sold to you all my interest in this business, I am to have liberty to carry on business in my own name where I please.' That means, 'I am to be as free to carry on business as if I had not sold to you, and in the same way as if I had not sold to you.' So that all the three judges rested their decision on the meaning of the words in clause 3.

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In point of decision neither of these cases governs that before me. *Gray v. Smith* (1) does not, for it related to the use of the trade name, and not to the canvassing of customers. It is, however, an authority in favour of the defendants to this extent, that it decides that a contract for the sale of assets generally does not always confer upon a purchaser the same rights as one in which goodwill is specifically mentioned. Neither, again, does *Pearson v. Pearson* (2), for all the learned judges rely on the terms of the clause, no equivalent to which is found in the agreement with which I have to deal. It appears, however, to be an authority in favour of the plaintiff in so far as it contains expressions of opinion by the majority of the Court that under a clause, not substantially differing from the agreement before me, the defendant was not entitled to canvass customers, while the third learned judge (Cotton L.J.) apparently was not of that opinion.

It appearing, therefore, from the decision in *Gray v. Smith* (1) that in some cases a contract for sale of assets does not confer on a purchaser the same rights as if the items of which the assets consist, and in particular the goodwill, were specifically enumerated, it becomes of importance to inquire in what cases this happens. Now, on a sale of property the parties do not in general contemplate the possibility of personal liabilities on the part of either contracting party arising otherwise than out of the contract itself. If, then, the purchaser tries to use some part of the purchased property (such as the trade name) in such a way as to throw on the vendor a liability not directly arising from the relation of vendor and purchaser, it may well be that he should not be allowed to do so unless he can point to some-

(1) 43 Ch. D. 208.

(2) 27 Ch. D. 145.

thing in the contract which justifies his act over and above the mere description of the subject-matter of the sale in such general terms as "assets," "interest," "property," or the like. On the other hand, if a vendor seeks to exonerate himself from a liability which would be the ordinary consequence of a sale of property comprised in the contract, I think that he ought not to be allowed to do so unless he can point to some express stipulation in the contract for sale giving him that right. This view appears to be consistent with both *Gray v. Smith* (1) and *Pearson v. Pearson* (2) as I understand them.

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It is to be observed that the obligation enforced in *Trego v. Hunt* (3) is one which is not confined to goodwill, but extends to other kinds of property. If, for example, the assets sold by the defendant to the plaintiff had included a house which adjoined land belonging to the defendant, he would not after the sale be entitled to build upon the land so as to obstruct the access of light to the house which he had sold. This rests on the same principle as is applied in *Trego v. Hunt*. (3) It is true that if the house commanded a sea view the defendant could not be restrained from building so as to shut out from the house the view of the sea; but the reason is that the law does not recognise any property in a view, although it does recognise a right to the access of light to windows. As the law recognises a property in goodwill, I think that the defendant by selling it came under an obligation not to do any act which would injure or depreciate it, and amongst such acts is included canvassing of the old customers.

It was also contended on behalf of the defendant that the word "assets" ought not to be held to include more than would be ordered to be sold if the Court were directing a sale for the purpose of winding up the partnership. In such cases it has been the practice (certainly ever since the decision in *Johnson v. Helleley* (4)) to introduce into the particulars of sale some form of words similar to that framed by Turner L.J. in that case, namely, that the sale "will not prevent any of the persons heretofore interested in the business, or those who may represent

(1) 43 Ch. D. 208.

(3) [1896] A. C. 7.

(2) 27 Ch. D. 145. \*

(4) 2 D. J. & S. 446, 449.

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STIRLING J. them, from carrying on the like business." It was said that under such words a person interested in the business sold might canvass the old customers. My first impression was that he would only be entitled to carry on the business in such a way as not to injure the goodwill sold; but I find it difficult to draw any satisfactory distinction between the form of words in *Johnson v. Helleley* (1) and the terms of clause 3 of the agreement which is discussed in *Pearson v. Pearson* (2); and it may be that they authorize the carrying on of the business in the same way as if no sale had been made. If this be so, the reason may be that on a compulsory sale by the Court the persons interested are not to be treated as vendors any more than a bankrupt is when a trustee in bankruptcy sells the goodwill of his business. These, however, are points on which I express no opinion, leaving them to be decided when the case arises. My present decision rests on these findings: that the sale with which I have to deal is not a compulsory one by the Court, but is substantially a voluntary agreement not containing any express stipulation reserving to the defendant any right to carry on business. I think, therefore, that the defendant is subject to the ordinary obligations of a vendor.

It was said, however, that even if this were so, an interlocutory injunction ought not to be granted, because the defendant entered into the agreement under a mistake in respect of which he may be entitled to relief at the trial.

[His Lordship then referred to the evidence on this point, and said:—] Mistake may arise in two ways. There may be mistake on the part of both parties, in which case the agreement would have to be modified in accordance with what the real agreement was; or it may be unilateral, and in that case the defendant who made the mistake would only be entitled to relief if he could shew that the mistake was brought about by some act on the part of the plaintiff: see *Wilding v. Sander-son*. (3) In that case, however, the relief would be different, because it might involve a rescission of the whole agreement if the case were established. I can only say at this stage it does

(1) 2 D. J. & S. 446, 449.

(2) 27 Ch. D. 145.

(3) [1897] 2 Ch. 534.

not seem to me that I can arrive at a conclusion that the defendant will certainly make out such a case at the trial, and for the present purpose I must treat the agreement as binding. I think even if I came to a contrary conclusion I should, on the balance of convenience or inconvenience, think that the proper course was to grant the injunction, and, in that case, treat the defendant as protected by the undertaking in damages. I think, therefore, in this case there ought to be an injunction in the terms of *Trego v. Hunt*. (1)

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Solicitors: *Rashleigh, Son & Hall; Boyce & Son.*

G. A. S.

*In re* PERRY ALMSHOUSES.

[1897 P. 0126.]

*Charity—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 70, 75—  
“Ecclesiastical Charity.”*

STIRLING J.

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Jan. 12, 13;  
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The founder of an eleemosynary charity prescribed by the instrument of foundation that the objects should be selected from among persons who should have (1.) regularly attended divine service at the parish church for a fixed period, (2.) been partakers of the Holy Communion, (3.) lived a godly, righteous and sober life to the glory of God's Holy Name, and that the trustees should be members of the Church of England:—

*Held*, that this was a charity the endowment whereof was held for the benefit of members of the Church of England as such, and was therefore an ecclesiastical charity within s. 75 of the Local Government Act, 1894.

THIS was a petition by the present trustees of a charity known as the Perry Almshouses, in the parish of Winterbourne, in the county of Gloucester, presented under s. 70, sub-s. 2, of the Local Government Act, 1894, by way of appeal from a decision of the Charity Commissioners, that the charity was not an ecclesiastical charity within the meaning of the Act. The charity was founded by an indenture dated July 31, 1851, whereby Mrs. Mary Ann Jones conveyed to the Rev. W. B. Allen, rector of Winterbourne, H. Marsh, W. Tanner the younger, and W. C. Fox a piece of land and ten cottages then

(1) [1896] A. C. 7.

STIRLING J. in the course of erection, situate in the said parish and county, upon the following trusts: "Upon trust that they the said 1898  
 W. B. Allen, H. Marsh, W. Tanner and W. C. Fox and the PERRY  
 survivors and survivor of them and the heirs of such survivor ALMSHOUSES,  
 or their or his assigns do and shall from time to time and at all In re.  
 times hereafter permit and suffer such poor men and women of sound mind who shall have attained the age of sixty years or be incapable of wholly maintaining themselves respectively by the manual labour of themselves respectively and who having been born within the limits of the parish of Winterbourne aforesaid shall have resided within such limits for the last five years of their respective lives or having been born elsewhere shall have resided within the limits aforesaid for the last ten years of their respective lives and who (not being let by sickness or some other urgent cause) shall have attended divine service at the church of the parish of their respective residences for the time being every Sunday for the last five years of their respective lives and been partakers of the Holy Communion and lived a godly righteous and sober life to the glory of God's Holy Name as the trustees for the time being of the charity hereby established or any three of them shall from time to time select to occupy the said cottages or dwelling-houses with the appurtenances thereto respectively belonging rent-free during their respective lives if they respectively shall so long conform to and abide by such rules and regulations as the trustees for the time being of the said charity or any three of them shall from time to time make for their comfort and well-being . . . . Provided always and it is hereby declared that every future incumbent of the rectory of Winterbourne aforesaid shall by virtue of his office of rector thereof be a trustee of the said charity and that when and so often as the same rectory shall become void by the death resignation or deprivation of the said W. B. Allen or any future incumbent thereof or otherwise and any other clerk shall be instituted and inducted into the same the said piece or parcel of ground and cottages or dwelling-houses or other hereditaments and premises hereby granted with their appurtenances shall be conveyed so and in such manner that the same may become vested in the new incumbent of the same rectory jointly



with the laymen who shall for the time being be trustees of the said charity upon the same trusts and subject to the same provisoes as are hereinbefore declared or expressed and contained of or concerning the same And that when and so often as the place of any of them the said H. Marsh, W. Tanner and W. C. Fox or any other layman in the trusteeship of the said charity shall become vacant by his death ceasing to be a member of the United Church of England and Ireland or resignation or otherwise the surviving or continuing lay trustees for the time being of the said charity or if they shall neglect or fail so to do within three calendar months next after the occurrence of such vacancy then the incumbent for the time being of the rectory of Winterbourne aforesaid shall by writing under their or his hands or hand appoint some other layman who shall be a member of the United Church aforesaid to be a trustee of the said charity in the room of the layman whose place in the said trusteeship shall have so become vacant as aforesaid," with consequential directions. All the existing and past trustees and beneficiaries under this deed were members of the Church of England.

A question having arisen, or being about to arise, as to the appointment of trustees of the charity, the existing trustees applied under s. 70 of the Local Government Act, 1894, to the Charity Commissioners to determine the question, and the commissioners decided that this charity was not an ecclesiastical charity. The trustees of the charity presented a memorial to the Attorney-General desiring to appeal against this order, and the Attorney-General, on hearing the memorial and at the request of the Charity Commissioners, sanctioned the appeal.

*Swinfen Eady, Q.C.*, and *Danckwerts*, for the petitioners. This is an "ecclesiastical charity" within the meaning of s. 75, sub-s. 2 (e), of the Local Government Act, 1894. (1) The

(1) Sect. 75, sub-s. 2, provides as follows: "In this Act, unless the context otherwise requires . . . the expression 'ecclesiastical charity' includes a charity, the endowment whereof is held for some one or more of the fol-

lowing purposes: (a) for any spiritual purpose which is a legal purpose; or . . . (e) otherwise for the benefit of any particular Church or denomination, or of any members thereof as such."

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STIRLING J. endowment is held for the benefit of members of the Church of England as such. According to the express terms of the deed, not only must the objects of the gift be members of the Church of England, but the trustees also. In many cases of charities of this kind the donor or founder expresses merely a preference for those who shall have attended the same church as himself; but here the gift is more explicit. The founder has expressly laid down certain qualifications as necessary for the objects of her bounty, the most important of them being the participation in the Holy Communion, and that qualification cannot properly be possessed by any other than a member of the Church of England. The founder could not have more solemnly or effectually prescribed that the objects of the charity should be members of the Church to which she belonged. With regard to the first qualification, namely, attendance at church, that is a statutory obligation imposed upon members of the Church of England and still binding: *Taylor v. Timson*. (1)

In *Attorney-General v. Calvert* (2) the question was whether certain charities ought to be dispensed amongst persons holding the religious tenets and doctrines of the Church of England to the exclusion of all others, or whether the objects of the charities were persons of all persuasions, and Lord Romilly M.R. said that the first principle was that the intentions of the founder were to be carried into effect. In this case those intentions are clearly expressed by the instrument of foundation, and the objects of the charity are limited to persons who conform to the rites and tenets of the Church of England and are communicants. If this charity be not "ecclesiastical," it is difficult to conceive one which is.

In *In re Ross' Charity* (3), where the bounty was to be given by the churchwardens to "six old and poor widows of the parish whom they should judge the properest objects to receive the same with preference to those who not being disabled by infirmity or sickness were most constant in their attendance on the public service of the church," North J. held that the charity was not an "ecclesiastical charity" within the meaning of the

(1) (1888) 20 Q. B. D. 671.

(2) (1857) 23 Beav. 248.

(3) [1897] 2 Ch. 397.

Act; but there church attendance was not a condition precedent, and we submit that in this case his Lordship would have come to a different conclusion.

[They also referred to *Shore v. Wilson* (1), *Baker v. Lee* (2), *Attorney-General v. Clifton* (3), and *Attorney-General v. St. John's Hospital, Bath*. (4)]

*Cozens-Hardy, Q.C.*, and *Vaughan Hawkins*, for the Charity Commissioners. This is not an endowment for the benefit of members of the Church of England "as such" within s. 75 of the Local Government Act, 1894. So long as the objects of the charity comply with the conditions of the deed, no Court can inquire into their religious views. The condition as to receiving Communion was mainly relied on as establishing the qualification of membership, but *prima facie* it is the right of every parishioner to partake of Communion at the parish church, and he cannot be excluded except under special circumstances: *Jenkins v. Cook*. (5) The fact that a parishioner is at the time of presenting himself for Communion a member of another sect is not a ground for excluding him.

[STIRLING J. *Jenkins v. Cook* (5) does not decide that a man may be admitted to Communion if he is not a member of the Church.]

As a matter of history, it is notorious that members of other sects used to attend divine service and receive Communion in the Church of England: May's Constitutional History of England, vol. ii. p. 346; Lecky's History of England, 1892 ed. vol. i. p. 322; and the practice is not unknown in modern times, especially in country districts where there is no other place of worship. Partaking of the Communion is not an incident, condition, or definition of membership of the Church of England. There is no legal definition of membership, and no clergyman can ask a communicant whether he is a member of the Church or not. The only test of membership is by a person conscientiously declaring himself to be a member: see Dean Church's evidence on the Ecclesiastical Courts Commission,

(1) (1842) 9 Cl. & F. 355.

(2) (1860) 8 H. L. C. 495.

(3) (1863) 32 Beav. 596.

(4) (1876) 2 Ch. D. 554.

(5) (1876) 1 P. D. 80.

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STIRLING J. 1882: Parliamentary Papers, 1883, vol xxiv. p. 346. The Occasional Conformity Act and the Schism Act and the subsequent repealing Acts are material as shewing that the Legislature recognised conformity and not membership: see Lecky's History of England, 1892 ed. vol. i. pp. 115, 322. Even if the founder intended to exact the test of membership, she has not carried out her intention effectively so as to make this an ecclesiastical charity within the Act of 1894. One object of that Act was to give to the parish council a voice in the management of parochial charities other than purely denominational charities: see ss. 6, 14, 19. That involves that the excepted charities shall be confined to persons who are members of one particular denomination to the exclusion of all others; and if that had been the intention of the founder, she ought to have expressly stipulated that the objects should be members of the Church of England. But we say further that the founder intended conformity and not membership to be the test. The commissioners in determining that this was not an ecclesiastical charity were guided by the principle of construction laid down by Lord Romilly in *Attorney-General v. Calvert* (1) (where the distinction between conformity and membership is expressly recognised), that in the case of an eleemosynary charity the religious opinions of the founder are not to be treated as forming any indication of his intention as to the objects. That principle has been since acted upon in *Attorney-General v. St. John's Hospital, Bath* (2), and *In re Ross' Charity* (3), and cannot be now disputed.

We submit that the decision of the commissioners was correct.

*Swinfen Eady, Q.C.*, in reply. There can be no question that there is an Established Church, and the suggestion that the phrase "a member of the Church of England" has no meaning is, therefore, not tenable. It is a phrase well known to the Legislature: see Universities Tests Act, 1871 (34 & 35 Vict. c. 26), s. 3, provisoes 1 and 2; and the difficulty of predicating whether in a particular case a person is or is not a member will not prevent the Court from giving effect to that

(1) 23 Beav. 248.

(2) 2 Ch. D. 554.

(3) [1897] 2 Ch. 397.

phrase. The rubrics, which have the force of law, shew that no person can receive Communion unless he has been formally admitted a member of the Church, and impose upon members of the Church the duty of receiving Communion. Partaking of Communion involves baptism and confirmation by a bishop : see the rubric at the end of the office of the Public Baptism of Adults, the rubric at the end of the Office of Confirmation and the rubric at the end of the Communion Office. The founder would have added nothing to the religious qualification prescribed by the deed if she had said in express terms that no person should be admitted to the charity except members of the Church of England. In determining the intention of the founder every part of the instrument must be looked at, and therefore the reference to the religion of the trustees is not immaterial.

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*Cur. adv. vult.*

Feb. 16. STIRLING J., after stating the facts, continued as follows:—The question is whether the endowment of this charity is held for the benefit of any members as such of any particular Church or denomination within the meaning of s. 75, sub-s. 2 (e), of the Local Government Act, 1894.

It may be remarked with reference to this clause, first, that all Churches and denominations are for the purposes of it placed on the same footing, and consequently that the present case must be dealt with according to the same principles as would apply if the charity were for the benefit of any Church or denomination other than the Church of England; secondly, that the words “as such” are important, the meaning being that in order to bring a Church within the definition of an ecclesiastical charity those for whose benefit it is intended must be limited to a class of persons having the status of members in a particular Church or denomination.

The charity is eleemosynary in its nature, and the rules of law with reference to religious qualifications for the enjoyment of the benefit of such charities were laid down by Lord Romilly in the case of *Attorney-General v. Calvert* (1), and were accepted

(1) 23 Beav. 248.



STIRLING J. by counsel on both sides as applicable to the present case. I  
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read, therefore, a few sentences from the judgment by way of general statement of the law. He says (1): "The first principle which is applicable to all these charities, without exception, is, that the intentions of the founder are to be carried into effect, as far as they are capable of being so, and so far as they are not contrary to law, using the word in its proper and widest signification, as including the precepts of religion and morality. If, therefore, the founder has directed, that only persons conforming to the Church of England shall be recipients of his bounty, his will must be followed." After discussing the application of this rule to religious and educational charities, his Lordship passes on to eleemosynary charities, and says this (2): "When the charity in question is one of a purely eleemosynary character, a wholly different class of consideration arises. No doctrine of law, no precept of religion, establishes, that the act of relieving a fellow creature from the privations or calamities which have befallen him ought to be preceded by ascertaining that he holds opinions in accordance with the true doctrine of Christ, as promulgated in the Gospel, or with those which the donor believes to be such. The duty of relieving his fellow creature in distress is imposed on the Christian irrespective of religious doctrines and tenets, and notwithstanding that the object of charity may worship God in an erroneous manner, but in that which he believes to be most acceptable to his Creator. In these charities, therefore, I consider that the presumption, that all classes were intended to participate in the bounty bestowed, is so strong, that it requires a clear and distinct expression of unequivocal import to exclude any class of dissenters from the benefits of the original foundation; where such clear expressions are used, the Court must follow them, because the rule of this Court is, as I have already stated, to carry the will of the founder into effect, when it violates no rule of law or morality; but in such a case, it requires strict proof that such was the will of the founder, and all evidence as to the peculiar tenets and opinions of the founder are inadmissible as evidence of his intention.

His intentions must be found to be expressed in the instrument itself, the burden of proof being thrown on those who seek to exclude." STIRLING J.

The question, therefore, is whether upon the true construction of the instrument of foundation there is found a clear expression of intention that the benefits of the charity should be limited to the members of the Church of England.

Although the deed prescribes that the trustees shall be members of the Church of England, it does not in terms declare that membership of that Church shall be a necessary qualification of those who are to benefit under it. The religious qualification required is three-fold. The first qualification is, regular attendance at the parish church; the second is, participation in the Holy Communion; the third is expressed in words drawn from the Prayer Book, "living a godly, righteous and sober life to the glory of God's Holy Name." It is therefore to be determined whether the possession of these qualifications does or does not involve membership of the Church of England; and though regard must be paid to all three, the most important, from this point of view, is the second.

It was contended on behalf of the respondents that the requirements of the deed were satisfied by conformity to the Church of England without membership of it. If by conformity is meant a mere external conformity such as was the fruit of the legislation of the time of King Charles II., now repealed, I think that such a construction is excluded by the third of the qualifications to which I have referred. The language in which that qualification is expressed appears to me to shew that the objects of the founder's charity were intended to be not mere outward conformists, but honest and sincere worshippers at the parish church. The argument, however, was mainly directed to shew that the first and second of the religious qualifications might be truly possessed by persons who are not members of the Church of England. As regards attendance at church, I think that this might be so. By law the parish church is open to every parishioner who desires to enter for the purpose of attending the ordinary services: *Taylor v. Timson*. (1) Those

(1) 20 Q. B. D. 671.

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STIRLING J. services have been so framed that members of other religious denominations can and do honestly and sincerely join in them from time to time, and might under special circumstances do so with regularity. Participation in the Holy Communion, on the other hand, is not open at all. The rubric at the end of the Office for Confirmation in the Prayer Book prescribes that "there shall none be admitted to the Holy Communion until such time as he be confirmed or be ready and desirous to be confirmed." The rubrics are incorporated in the Act of Uniformity (13 & 14 Car. 2, c. 4): see *Escott v. Mastin* (1), and, so far as that statute remains unrepealed, must, I conceive, be duly regarded by a court of law. It seems to me that the effect of that rubric is to prevent any one from claiming as of right to partake of the Communion in the Church of England unless he has been confirmed or is ready and desirous to be confirmed. Confirmation implies baptism, which, however (as was established by the case of *Escott v. Mastin* (1), above cited), may validly be administered by a layman.

Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptized, has been confirmed, or is ready and desirous to be confirmed, and is an actual communicant, does hold the status of a member of that Church, and would be ordinarily regarded and spoken of as such.

It was urged that a person not a member of the Church of England might honestly and sincerely partake of the Communion although not confirmed. It is said that as a matter of history persons who do not possess this qualification have been admitted to the Communion by clergymen who were well aware of the fact, and cases were put which are not of impossible occurrence with reference to persons who might seek the benefit of this charity. Still, even if this be conceded to the full, the participation would be granted as a matter of grace and not as of right. All such cases appear to me to be in their nature of such an exceptional character that they could not fairly be regarded as within the contemplation of the framer of

an instrument such as that with which I have to deal. The STIRLING J. partaking of the Communion there spoken of is, I think, such as takes place in the ordinary and rightful course, regard being had to the rules of the Church.

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The conclusion at which I arrive on the construction of the instrument is that the persons intended to take the benefit of the charity were to possess qualifications which imply that they should be members of the Church of England. On any other view, I fail to see how the founder of a charity intending to confine its benefits to the members of any Church or denomination as such could do so except by using those very words; and indeed the argument was carried to that extent. I cannot think that this is a reasonable intention to ascribe to the Legislature.

I understand that the Charity Commissioners rested their decision on a passage in Lord Romilly's judgment which I have not hitherto cited. It runs as follows (1): "After fully considering the will and all the directions contained in it, and having regard to the principles I have laid down on the subject, by which I have stated that I consider myself to be governed, I am unable to see anything in this will which should exclude any dissenters from obtaining the benefit of the charity created by it, who can conscientiously comply with the directions laid down by the founder, modified, as they are, by the change produced by the Reformation and the Statutes which have since passed. Whether the Dissenter can do so or not is an affair between God and his own conscience, but, as I conceive the duties imposed upon the trustees, it is not an affair on which they are called upon to judge. They are bound to see that the rules prescribed by the founder, so far as by law they are in force, are complied with by the alms-people, but beyond this their duties cease. All that I find in this will is, a direction that certain rules shall be complied with. The person who cannot conscientiously comply with these rules must decline becoming one of the alms-people, or if elected must resign; but I repeat my opinion, that if he do so conform to these rules, the trustees can go no further, and that it is not open to

STIRLING J. them to examine whether he does so sincerely, or whether, having regard to his other religious observances, and his expressed opinions, he be or be not properly a member of the Church of England."

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I do not differ from anything there laid down, nor from the application made of it by the Master of the Rolls in the case before him. In the present case, however, the founder has gone much further than in the instruments which were considered in *Attorney-General v. Calvert* (1), and has imposed upon his trustees the duty of inquiring and determining (so far as human judgment permits) whether the qualifications with which I have been dealing do or do not exist.

For the reasons which I have given I am unable, with the most sincere respect, to agree with the decision of the Charity Commissioners.

*Swinfen Eady, Q.C.* I ask that the costs of the hearing may follow the event. The Court has power to deal with the costs of this appeal under s. 8 of the Charitable Trusts Act, 1860, which is incorporated in s. 70, sub-s. 2, of the Local Government Act, 1894.

*Cozens-Hardy, Q.C.*, said that he knew no case in which costs had been given against the Charity Commissioners.

STIRLING J. declined to establish a new precedent, though he thought it a hard case. There would be no order as to the costs of the commissioners, and the trustees would be at liberty to retain their costs out of the charity fund.

Solicitors: *Tatham & Procter, for Abbot, Pope, Brown & Abbot, Bristol; Clabon.*

(1) 23 Beav. 248.



*In re* DE NICOLS.  
DE NICOLS *v.* CURLIER.

[1897 D. 968.]

KEKEWICH  
J.

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Feb. 3.

*International Law—Marriage—Domicil—Matrimonial Domicil—Change of Domicil—After-acquired Property—Movable Goods—French Law—Community of Goods.*

Where a Frenchman and a Frenchwoman marry in France without entering into any marriage contract, their respective rights to movable property subsequently acquired by them or either of them during the coverture are governed by the law of the matrimonial domicil and are not affected by any change of domicil, even though the property may have been acquired during the new domicil.

A Frenchman and a Frenchwoman, both poor, married in France without any express marriage contract. Subsequently they came to reside in England and acquired an English domicil. While domiciled in England the husband amassed a large fortune and died, having purported to dispose of all his property by an English will, but leaving his wife surviving:—

*Held*, that, as to “movable goods” the French marriage law as to community of goods prevailed, and that the widow was therefore entitled to one-half of the movable goods.

IN 1854 Nicolas Daniel Thevenon, a Frenchman, married his first cousin, a Frenchwoman, at the mayor’s office of the Third District of Paris, and the marriage was duly registered at the Prefecture of the Department of the Seine. In accordance with French law and custom the municipal officer who performed the ceremony formally called upon the parties to declare whether they had executed any contract of marriage, to which they both replied in the negative, when their answers were duly recorded on the usual “Minute”; and as a matter of fact it appeared from the evidence in the present case that no contract of marriage was executed. The book in which the marriage was registered was, it appeared, subsequently burnt, with other official records, in the troubles of the Commune after the close of the Franco-German war in 1871.

At the date of the marriage the husband was a man of no means whatever, being a working coachmaker in Paris at

KEKEWICH wages. The wife was an assistant in a linen business, and had a little property of her own amounting altogether to about 120*l*.  
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Soon after the marriage the husband and wife became managers of a wine and spirit business in Paris, which in a year's time they purchased from the proprietor for 240*l*., the purchase-money being made up by the wife's property and the joint earnings realized by her husband and herself in carrying on the business. In December, 1862, they sold that business for about 580*l*. In October, 1863, they came over to England, and with a sum of about 400*l*., which represented their sole property, set up in London a small restaurant, called the "Café Royal," in Glasshouse Street, Regent Street. Ultimately under their joint management this restaurant expanded into a large establishment of the same name in Regent Street. Shortly after their arrival in England the husband changed his name to "Daniel Nicolas de Nicols," and in 1865 took out letters of naturalization as a British subject under that name. He and his wife remained in England until his death, she actively assisting him in the management of the café. Out of that business, and from an interest in a valuable building site in London, the husband amassed a large fortune. On February 28, 1897, he died, having made a will dated March 22, 1895, in the English form, in which he described himself as "of the Café Royal, No. 68, Regent Street, in the county of Middlesex, and Regent House, Surbiton, in the county of Surrey, restaurant proprietor," and proceeded, "I hereby declare that I am a domiciled Englishman naturalized in England in the year 1865." Then, after appointing three persons his executors and trustees and bequeathing various legacies, he devised and bequeathed to them his residuary real and personal estate in trust for sale, and to hold the proceeds upon trust for his wife for life, and after her death upon trust for his daughter (the only child of the marriage), her husband and children. The testator was at his death possessed of property of the total value of about 600,000*l*., comprising considerable freehold and leasehold properties, besides investments in numerous stocks and shares. It was said that he also had 100,000*l*. worth of wine in France. There was only one child

of his marriage, a daughter, who was married and had several children, of whom one, a daughter, was now the wife of the Marquis de Brulle.

This was an originating summons taken out by Madame de Nicols, the testator's widow, against the executors and trustees of his will, his daughter and her children, to ascertain (amongst other things) what were the rights and interests of the plaintiff in the real and personal estate of her late husband, the testator, by reason of their having married without any marriage contract or settlement, the parties being at the time domiciled in France. Subsequently the question for decision was formulated in chambers as follows: "Did the change of domicile alter the legal position of the parties to the marriage in reference to property?" The summons was then adjourned into court for argument on this question, and now came on for hearing. Upon the summons being opened it was arranged that the argument should, for the present, be confined to the effect of the change of domicile on the testator's "movable goods" only.

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*Renshaw, Q.C.*, and *Ingle Joyce*, for the plaintiff. We submit that this case, as regards the "movable goods," is governed by the French law of marriage as to "community of goods," and that the plaintiff therefore takes one-half of the property. *Primâ facie*, according to the law of this country, and in the absence of any marriage contract or settlement, it is the domicile at the time of the marriage that governs the rights of the spouses: Westlake on Private International Law, 3rd ed. pp. 68, 69, § 36; *Watts v. Shrimpton* (1); Dicey on the Conflict of Laws, p. 648, r. 171. The possible "exception" stated by the learned author (*Id.* p. 650) as to the effect of a change of the domicile of the parties after marriage is not supported by any English authority. In the Addenda (*Id.* p. xlii.) the author cites *In re Marsland* (2) as apparently shewing that rights acquired by the law of the matrimonial domicile may be lost by a change of domicile; but the actual point now raised was not discussed in that case.

(1) (1855) 21 Beav. 97.

(2) (1886) 55 L. J. (Ch.) 581, 582; S.C. 34 W. R. 540; 54 L. T. 635.

KEKEWICH J. [KEKEWICH J. That was a different case: it was one of “reverter.” The passage in Kay J.’s judgment, as to the effect of the change of domicile, was only an incidental observation.]  
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 DE NICOLS, *In re.* Boyer’s Case (1), a French decision, supports our view.  
 DE NICOLS That case is substantially the same as the present, except that  
 v. the facts are inverted.  
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Mr. Dicey also refers in his work (p. 651) to an American writer, 2 Bishop, Law of Married Women, s. 569, as supporting the proposition that acquisitions by married persons subsequent to a change of domicile are governed by the laws of that domicile. But Mr. Dicey adds, “Which of these two views”—i.e. whether the law of the matrimonial domicile or the law of the subsequent domicile—“will be finally adopted by our courts, is, it is conceived, fairly open to doubt. The validity, therefore, of the Exception to Rule 171 must be considered as an open question.” That very question is now raised for the first time in the English courts in the present case. The case must, therefore, be decided on principle. If it is sound that a change of domicile alters the law as applicable at the time of the marriage, that operates unfairly on the wife, for as by law the domicile of the wife is that of her husband, he can, by changing his domicile, and without any consent on her part, take away all her rights.

[KEKEWICH J. In other words, he can change the marriage contract, but she cannot.]

Precisely. Therefore, on principle, the original matrimonial rights should remain. In the absence of any contract or settlement by deed, the French law makes a marriage contract for the parties, just as the English law makes, by the Statutes of Distribution, a will for an intestate.

There is no magic in an actual settlement under seal: the French law makes the settlement for the parties, and that settlement has precisely the same effect as if it were written out in the form of a deed and signed, sealed and delivered. If that is the correct view, the original contract between the parties cannot be altered by a subsequent and accidental change of domicile.

(1) Dalloz, Jurisprudence Générale Recueil Périodique, 1854, Part I. p. 61.



*Warrington, Q.C., E. J. Elgood, and Maugham*, for the defendants, the trustees of the will, submitted to act as the Court should direct.

*A. V. Dicey, Q.C., and Whinney*, for the defendants, the testator's daughter and her children. There is not a single English decision that the law of the domicile of the husband at the time of the marriage determines the right to his property afterwards acquired during a change of his domicile; so that the point now raised is quite new, and is treated as such in Story on the Conflict of Laws, 7th ed. p. 209, § 171, though the writer does mention instances in which it has been held that the law of the actual domicile governs all property whether acquired before or after the removal: *Id.* pp. 258, 259; 1 Burge, Col. & For. Law, Pt. I. c. 7, s. 8, pp. 617-619; *Lashley v. Hog* (1), where Lord Eldon, referring to *Foubert v. Turst* (2), seems to have considered that "if there had been no contract, the law of England would have regulated the rights of the husband and wife, who were domiciliated in England, at the dissolution of the marriage."

[*Renshaw, Q.C.* Westlake says (3rd ed. p. 74), referring to that passage from 1 Robertson's Sc. Ap. Ca., "This dictum has been quoted in favour of the new as against the matrimonial domicile . . . but it is not likely that Lord Eldon meant anything of that kind."]

In *In re Lett's Trusts* (3) it was held that a wife domiciled with her husband in New York, they having been at the time of their marriage domiciled in Ireland, was entitled to receive payment of her share of an intestate's estate in Ireland, it being proved that by the law of New York a married woman was entitled to receive a share of an intestate's estate as if she were unmarried.

[KEKEWICH J. The order there made was on an unopposed petition. The point was not really argued, for the petitioner alone appeared. That case cannot be regarded as any authority.]

(1) 1 Burge, Col. and For. Law, pp. 623-25; (1804) 1 Robertson's Sc. App. Ca. 4; 4 Paton's Sc. App. 581, 613-14. (2) (1703) 1 Bro. P. C. 2nd ed. p. 129. (3) (1881) 7 L. R. Ir. 132.

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KEKEWICH J. The principle seems to be, and it is supported by Story, 7th ed. p. 210, § 171 b, that the law of the place of actual domicile is the controlling law in regard to all rights springing from the marriage relation.

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p. 259.]

But Lord Eldon seems to have recognised that principle in *Lashley v. Hog*. (1) It is also laid down in 1 Burge, For. & Col. Law, Pt. I. c. 7, s. 8, pp. 617-619; and it has been adopted in America: *Murphy v. Murphy*. (2)

[KEKEWICH J. What is the distinction between the case of a contract made for the parties by the law of the country in which they are married, and the case of a will made for a man by the Statutes of Distribution? In the latter case the will made for him by law is his will. Why then should not the contract made for this husband and wife by the French law on their marriage be regarded as their contract?]

The answer to that is two-fold. First, the French law has provided for them, for the very reason that they have not made a contract, and the provision made by law extends only to property the parties have at the date of the marriage and what they may have so long as they preserve their matrimonial domicile; but that does not extend to property which they may possibly acquire after a change of domicile, for that is a state of things which could not have been in the contemplation of the parties at the time of their marriage. If on the other hand the parties make a settlement, it may be said that they are deliberately thinking of both actual and after-acquired property. In the absence of any express contract, if the parties afterwards elect to make their home in this country, it is not unreasonable to say that the law of England applies to all their property acquired here, for by making their home here they submit to the law of England. Secondly, if for one purpose French law is to be invoked, and for another purpose the English law, there would be a mixture of jurisdictions which it is impossible to say could have been in the contemplation of the parties at the time of their marriage. With regard to the

(1) 4 Paton's Sc. App. 617.

(2) (1817) 12 American Decisions, 475.

argument that the wife's original rights which she acquired at the time of her marriage are being taken away, there is no force in that objection, for there are cases in which a change of domicile by the husband does in point of fact alter the rights of the wife. Lord Eldon's judgment in *Lashley v. Hog* (1) shews that you cannot rely on the circumstance of the parties having been silent as to a contract as a ground for holding that they have entered into an express one by law. Moreover, the Code Napoléon excludes the idea of a contract such as is contended for: Book III. Title V. 1390, 1391, 1393, 1394, and 1400. If it is said there was a tacit contract on the marriage that applies equally to the new domicile. But where there is no express contract, no tacit contract will preserve the law of the matrimonial domicile: *Duncan v. Cannan* (2); and the American authorities take the same view: *Saul v. His Creditors*. (3) Therefore French law has no place in this country, but the English law must prevail; and we ask your Lordship to give effect to the American law as thus summed up in Story, 8th ed. p. 268, § 187: "Where there is a change of domicile, the law of the actual domicile, and not the matrimonial domicile, will govern as to all future acquisitions of movable property." (4)

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KEKEWICH J. The only question which I am now called upon to decide is whether the property described as "movables" of which this testator was at the date of his death the ostensible possessor really belonged to him wholly, or whether his widow surviving him was entitled to some interest in that property by virtue of the French law as applying to his property at the date of the marriage, and continuing during the rest of their lives.

That I understand to be the question. It is admitted that there is no binding decision in England on the question. There

(1) 4 Paton's Sc. App. 581.

(2) (1854) 18 Beav. 128.

(3) (1827) 16 American Decisions, 212, 228.

(4) As to the question what law should, in the absence of express contract, govern the mutual property-rights of husband and wife arising on

marriage, that is, whether they should be determined by the law of the place of marriage or by the law of the domicile—see also Sewell on French Law affecting British Subjects, 1897, Chap. VII. p. 94, Tit. "Régime Matrimonial."

KEKEWICH is said to be a decision of the Court of Chancery in Ireland ;  
 J. but I have already pointed out that there an order was made  
 1898 on an unopposed petition ; nor would even a considered Irish  
 DE NICOLS, decision be binding on me.  
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DE NICOLS Decisions in the American Courts are entitled to great  
 v. respect, but are not binding here ; and there are many circum-  
 CURLIER. stances affecting questions arising between the laws of different  
 — States which may or may not be applicable to questions arising  
 here.

There are dicta to be found of some English judges. Of course the dictum of Lord Eldon in *Lashley v. Hog* (1) is entitled to the greatest consideration, but it is difficult to know exactly what Lord Eldon meant ; and I think it would be too large a conclusion to say that he meant that which counsel for the respondents here have contended that he did mean.

The other dicta seem to me hardly to approach the subject ; at any rate, they do not directly touch the point I have to decide.

There are also dicta in the text-books ; and some of them, which we accept as weighty authorities, are distinct on the point, and as far as I can see they are distinctly in favour of the plaintiff. At any rate as far as any consensus of opinion may be gathered from them, it is not adverse to the plaintiff's claim in this case. The result is that I must decide the question on principle.

One immediately asks, On what principle ? It may be that the principle which occurs to one as the governing one is not the right one ; if so, no doubt I shall be corrected ; but if one once gets hold of a principle apparently governing the case, the only right thing to do is to follow that principle straight through to its legitimate conclusion, and apply it to the facts before the Court.

The principle by which I propose to guide my decision is this. The spouses here were French people, and they intermarried in France. It was open to them to marry according to one of two, or possibly more, classes of regulations affecting their matrimonial property—property, that is, which

either of them might acquire during the coverture. It is KEKEWICH J.  
 immaterial to consider what limit of choice they had. There 1898  
 was some limit of choice. They might have elected expressly DE NICOLS.  
 to marry according to the rule as to "community of goods"; In re.  
 but that rule was, in point of fact, applied by the law of France DE NICOLS  
 to their proprietary rights in the absence of any express election v.  
 to the contrary, and that was what, as far as we know, took CURLIER.  
 place. The result, according to the law of France, was to  
 subject the property which they then had, or might thereafter  
 acquire during the coverture, to the law of community of  
 goods. It seems to me that was a contract entered into by  
 them—a contract which in this Court we do not regard as less  
 effectual with respect to property thereafter acquired because  
 it had at that time no existence and was not then in contem-  
 plation. In a court of equity a contract to settle property  
 after-acquired is as effectual as a contract to settle property in  
 possession at the date of the contract.

If I am right in considering that the parties did for all pro-  
 prietary purposes enter into a contract although not expressed,  
 that contract was thenceforward binding so as to govern the  
 property then in possession or thereafter acquired, even though  
 neither of them at the moment contemplated a change of  
 domicile affecting such property as was in fact so acquired. If  
 that contract is properly to be inferred from the fact of mar-  
 riage by French spouses, and from the absence of any written  
 contract to the contrary, why am I to infer that there was any  
 subsequent alteration of that contract? It may be that it was  
 perfectly competent to them at any time to alter that contract  
 wholly or partially. I do not know, and I am not called upon,  
 nor do I choose to inquire, how far they could have altered that  
 contract during their domicile in France; but assuming it was  
 competent for them to do so, why should I infer that they did?  
 If I am at liberty to infer an alteration, why should I infer  
 that it was made at the moment of change of domicile to  
 England (a moment be it observed which it would be extremely  
 difficult to fix) rather than at any other time. If I am to infer  
 it, say, at the moment of the change of domicile to England, or  
 at any other time, why should I infer it solely as regards the



KEKEWICH property after acquired, property possibly no more in contemplation then than it was at the moment of marriage: why should I not also infer it with regard to property acquired before? It is said that rights acquired before change of domicil cannot properly be treated as altered by the change.

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If the principle which I have endeavoured to explain is right, then these spouses had acquired rights not only respecting the property they had at the time of the marriage, but respecting property which might come to them afterwards.

That seems to me to be the principle which I ought to apply. The spouses lived here: they became domiciled here. They were, to all intents and purposes, an Englishman and an Englishwoman; and although Mr. Dicey said he was going to rest to some extent on the fact that there was a change of nationality—that the testator became naturalized here—I have not heard the argument promised on that point, and I venture to think the real reason is that on consideration there is no argument to be stated. In all these matters the sheet-anchor of judicial decision must be domicil. You look to the domicil to ascertain what are the rights under the will—who are the proper distributees, to use a phrase that has been used in argument and which is to be found in the books—and to ascertain the rights of the parties to whom the distribution has to be made as between themselves. You look to the domicil in order to ascertain the property and the rights which are governed by it. You must look to the matrimonial domicil, which in this case was undoubtedly French, actually and intended, in order to see what the rights were. Then you must apply the domicil doctrine at the moment of death only to that property which is affected by it. It seems to me to be a fallacy to talk of the domicil at the date of death as governing rights which do not exist. It must govern the rights which do exist; it governs the rights of the testator to dispose of his property: it does not affect his attempt to dispose of property which was not his. For the purpose of seeing what was his property and what was not, we must look back to his express contract if there be one, and to that law which governs his proprietary right.



His proprietary right in this case seems to me on principle to have been fixed at the moment of his marriage by the law of community of goods, not only as regards the property which was then in possession, but the property which was afterwards acquired. I can see nothing on which I can properly as a matter of inference say that there has been any alteration of that contract or of those proprietary rights. I see no principle on which I can say that either at the moment of change of domicile or any time subsequent there was any giving up or surrender by the plaintiff of that to which she was entitled under the matrimonial contract. Therefore, it seems to me that I must hold that, in purporting to dispose of the whole of his property, to which disposition the law will give effect, the testator must be considered as disposing only of that which was properly his, and that the disposition did not include what would be the wife's under the matrimonial contract, that is, under the law of community of goods.

I am, therefore, of opinion that the plaintiff's right under the law of community of goods to the movable property acquired during the coverture by the spouses, or either of them, still remains unaffected by the will.

I will accordingly make a declaration that the change in or about the year 1863 from a French domicile to an English domicile by the spouses did not affect their respective rights under the French or matrimonial domicile in and to the movable property acquired by the spouses, or either of them, after such change. The rest of the summons will be adjourned, and also the costs.

Solicitors: *Hicks, Arnold & Mozley*; *Tyrrell Lewis, Lewis & Broadbent*.

G. I. F. C.

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BARNES v. YOUNGS.

1898

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[1898 B. 41.]

*Partnership—Arbitration—Agreement to refer—Power to expel Partner—Validity of Notice—Bona fides—Motion to stay Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.*

Articles of partnership provided that a partner might be expelled for breach of certain acts therein specified, and that if any question should arise whether a case had happened to authorize the exercise of this power, such question should be referred to arbitration. The defendants served a notice on the plaintiff to determine the partnership on the ground that he had committed a breach within the expulsion clause, but gave no details of the particular act complained of; the plaintiff thereupon brought an action to restrain the defendants from acting on this notice; the defendants moved to stay proceedings and refer all matters in dispute to arbitration:—

*Held*, that the preliminary question whether or not the notice of expulsion was valid was one more suitable for decision by the Court than by an arbitrator, and that as there was a suggestion of a fraudulent exercise of the power of expulsion, the Court, in the exercise of its discretion, ought not to stay proceedings and enforce a reference.

A partner is not entitled to spring a notice of dissolution on his co-partner without giving him some preliminary warning of the cause of complaint, and an opportunity of meeting the case alleged against him.

#### MOTION.

The plaintiff and the defendants carried on business together as iron and brass founders under articles of partnership of January, 1896, which provided (clause 31) that if any of the partners should during the continuance of the partnership be (amongst other things) “guilty of immorality or other scandalous conduct detrimental to the partnership business,” then the other partners might, by notice in writing given to him, determine the partnership, and publish a notice of dissolution of the partnership in the name of and against such partner, whereupon the same should immediately cease and determine: “Provided that if any question shall arise whether a case has happened to authorize the exercise of this power, such question shall be referred to arbitration.” Provision was also made for the purchase of an expelled or deceased partner’s

share by the continuing or surviving partners at a valuation to be made as therein mentioned; the articles also contained a general arbitration clause as follows:—

“37. If at any time during the continuance of the partnership, or after the dissolution or determination thereof, any dispute or questions shall arise between the partners or their or either of their representatives touching the partnership, or the accounts or transactions thereof, or the dissolution or winding-up thereof, or the construction, meaning, or the effect of these presents or anything herein contained, or the rights and liabilities of the partners or their representatives under these presents or otherwise in relation to the premises, then every such dispute, difference, or question shall be referred to two arbitrators, or their umpire, pursuant to the Arbitration Act, 1889, or any statutory modification or re-enactment for the time being in force.”

On December 21, 1897, the defendants signed and sent to the plaintiff the following letter: “We, the undersigned, hereby give you notice to determine the partnership heretofore subsisting between us under articles of partnership dated January, 1896, so far as you [naming the plaintiff] are concerned, on the ground that you have made a breach of clause 31 of the said articles of partnership by being guilty of notorious immorality, which immorality is detrimental to the partnership business.”

On January 4, 1898, the plaintiff commenced the present action against the defendants, and claimed (1.) a declaration that the partnership had not been and would not be effectually dissolved by the notice of December 21, 1897; (2.) an injunction restraining the defendants from publishing a notice of dissolution, or otherwise representing that the plaintiff had ceased to be a partner; and (3.) an injunction to restrain the defendants from excluding or attempting to exclude the plaintiff from the partnership premises, or from obstructing or interfering with the plaintiff in the active management and conduct of the business of the partnership, or from in any way restricting him in the exercise and enjoyment of his rights as a partner.

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ROMER J.      The defendants now moved, pursuant to the Arbitration Act, 1889, s. 4, that all proceedings in this action might be stayed, and all matters in dispute referred to arbitration in accordance with the provisions in the partnership articles.

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It appeared from the evidence that the plaintiff was living with a woman who was not his wife, but that this state of circumstances was known to some or one of the defendants prior to January, 1896; that the plaintiff had, through his solicitors, required the defendants to furnish particulars of their complaint against him, which had not been done, and that he had no means of knowing the alleged acts of notorious immorality said to be detrimental to the partnership business, and upon which the defendants sought to justify their notice. The business of the partnership was in a very flourishing condition, and plaintiff alleged that the notice had not been given *bonâ fide*.

*Neville, Q.C.*, and *Micklem*, for the defendants. The jurisdiction of the Court is not ousted, but, the matter in dispute being within the arbitration clause, the Court is bound to send the matter to arbitration if we insist upon it: *Davis v. Starr* (1); *Renshaw v. Queen Anne Mansions Co.* (2), cases that are precisely in point. We are acting strictly within clause 31 of the articles: the object of that clause, which provides for arbitration as well as the general arbitration clause, was to avoid a public discussion in open court, and this is emphatically the kind of case that ought to be referred to arbitration: *Russell v. Russell*. (3)

*Levett, Q.C.*, and *T. H. Watson*, for the plaintiff. Clauses conferring a power of expulsion are always construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion: *Lindley on Partnership*, 6th ed. p. 427. This notice is bad, because no particulars are given, and it is for the Court to decide this point and not for an arbitrator. A power to expel cannot be acted upon until the accused partner has had an opportunity of explaining his

(1) (1889) 41 Ch. D. 242.

(2) [1897] 1 Q. B. 662.

(3) (1880) 14 Ch. D. 471.

conduct: *Blisset v. Daniel* (1); *Cooper v. Wandsworth Board of Works* (2); *Wood v. Woad*. (3) ROMER J.

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Under the articles expulsion involves serious consequences; the provisions for the purchase of an expelled partner's share in the business are very advantageous to the continuing partners, and we say that this notice is not given *bonâ fide*; and in a case where there is a suggestion of fraud the Court will not in the exercise of its discretion enforce a reference to arbitration: *Wallis v. Hirsch* (4); *Russell v. Russell*. (5) The dispute here raises a question of law which can be better decided by the Court than by an arbitrator, and in such a case the Court refuses to stay proceedings: *Lyon v. Johnson* (6); *In re Carlisle*. (7) The defendants are bound to formulate their charges against the plaintiff, who is not bound to guess at what the notice refers to. The arbitration clause only comes into force when a proper notice has been given.

*Neville, Q.C.*, in reply. The cases relied on by the plaintiff only amount to this—that a man must not be condemned unheard. In *Blisset v. Daniel* (1) the partners were the tribunal to decide; in this case it is the arbitrator who is to exclude the plaintiff, if a breach of clause 31 has been committed. It is a question only of fact for the arbitrator. The defendants are ready and willing to refer the whole matter to arbitration, and it is just the kind of case that ought to be referred. *Renshaw v. Queen Anne Mansions Co.* (8) is in our favour. The objection that the notice is bad is purely technical; we could serve a fresh notice to-day giving all particulars.

ROMER J. In matters of this kind—motions to stay proceedings by reason of an agreement to refer to arbitration—the Court undoubtedly has a discretion—a judicial discretion of course. In the present case, looking at the circumstances, I think in exercising my judicial discretion I ought not to order a stay of proceedings. In the first place, there is to my mind a simple, or comparatively simple, preliminary question—whether

(1) (1853) 10 Hare, 493.

(2) (1863) 14 C. B. (N.S.) 180.

(3) (1874) L. R. 9 Ex. 190.

(4) (1856) 1 C. B. (N.S.) 316.

(5) 14 Ch. D. 471.

(6) (1889) 40 Ch. D. 579.

(7) (1890) 44 Ch. D. 200.

(8) [1897] 1 Q. B. 662.



ROMER J. the notice given the plaintiff is good or bad—which is much more fit for this Court to decide than an arbitrator, and which, if it had come before an arbitrator, he would have probably referred to the Court. It is certainly a question which is now ripe for decision, and which, in the interest of both parties, ought to be decided forthwith.

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The question arises in this way. The defendants in the action have purported to serve a notice upon the plaintiff expelling him for alleged misconduct. A power to expel of this class, as has been shewn in many cases, must be exercised with the utmost good faith. And undoubtedly, to my mind, it is essential that partners exercising a power of this kind should before they do so, and peremptorily exclude a co-partner and advertise that co-partner's exclusion, give him an opportunity of knowing before they serve the notice what the cause of complaint is, so that at any rate he may have an opportunity of explaining and, if possible, satisfying them that no good cause of complaint exists. I think partners are not entitled to spring a notice of dissolution on their co-partner without the slightest preliminary warning being given to him, and without calling his attention in the slightest degree to any alleged cause of complaint, and without giving him the slightest opportunity of meeting the case which is alleged against him. Now, that is what the defendants did in this case. It is sworn to by the plaintiff, and not denied by the defendants, that when they purported to serve this notice they had previously raised no cause of complaint against the plaintiff, and given him no opportunity of knowing that there was a cause of complaint, or of remedying that if he knew it existed. The question then arises, was that notice good or bad? In my opinion under the circumstances that notice was clearly bad. The details even of the defendants' complaint, or what is the real complaint against the plaintiff made by them, has never yet, so far as I know, been formulated or accurately stated by the defendants. It may be that, after they have given the plaintiff the opportunity of knowing exactly what is the cause of complaint against him, he may satisfy them that under the circumstances no good cause of complaint arises, and they may not serve any

further notice. If they do serve any further notice after giving the plaintiff a full opportunity of knowing what the exact cause of complaint against him is, and meeting it if possible, a question may arise hereafter which ought to go to arbitration, but no such question arises now.

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There was an additional ground on which arbitration should not as matters stand have been directed—that there was a charge by the plaintiff that the defendants did not exercise their power of expulsion *bonâ fide*. That was a charge which, had it arisen for decision, would have been better dealt with in court. I therefore make no order upon the motion to stay, except that I make the costs costs in the action.

Solicitors: *Crowders & Vizard, for Mills & Reeve, Norwich; Collyer-Bristow, Russell, Hill, Curtis & Dods, for Taylor & Sons, Norwich.*

W. C. D.

### *In re* DUTHY AND JESSON'S CONTRACT.

[1897 D. 1020.]

*Vendor and Purchaser—Completion—Documents not in Possession of Vendor—Expense of Obtaining—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.*

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Feb. 12.

Sub-s. 6, s. 3, of the Conveyancing and Law of Property Act, 1881, does not affect the ordinary right of a purchaser to have the title-deeds handed over to him on completion, and the mere fact that obtaining the deeds for this purpose may cause the vendor trouble and expense is no answer to the purchaser's demand.

On an open contract the vendor must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract.

### ADJOURNED SUMMONS.

This was an application under the Vendor and Purchaser Act, 1874, which raised the question whether, on an open contract, a vendor is bound at his own expense to obtain title-deeds not in his possession for the purpose of handing them

ROMER J. over to a purchaser on completion. The facts, so far as material, were as follows :—

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By a contract of January 18, 1897, the vendors agreed to sell to the purchaser a freehold house and premises, No. 32, Paget Street, Southampton, for 480*l.*, "The purchaser to accept the best title the vendors can give." The contract also provided for an indemnity at the vendors' expense against certain possible claims.

It appeared from the evidence that in 1848, the then owner of the property had mortgaged it to certain settlement trustees for 300*l.*, that some of these trustees had died, and there had been transfers to the new trustees; that subsequently the mortgage had been paid off, but that no reconveyance of the property had ever been executed. It was also stated that the mortgagees were all now dead, but that the mortgage deed of 1848 with certain other title-deeds and transfers were in the custody of Messrs. Talbot & Tasker, who had been the solicitors of the mortgagees.

Prior to the execution of the contract, the purchaser had an interview with the vendors' solicitors, when the nature and state of the earlier title to the property was fully explained to him, and he was told that these earlier title-deeds were not in the vendors' possession. A conveyance of November, 1894, and certain subsequent deeds, which were in the vendors' possession, were shewn to and gone through with the purchaser, who then expressed himself willing to take such title as the vendors had, and thereupon the contract was signed. It appeared to have been understood at the time that application was to be made by the vendors to Messrs. Talbot & Tasker for these earlier deeds, and no difficulty was then anticipated in obtaining them.

An abstract commencing with the conveyance of November, 1894, was delivered to the purchaser, upon which no requisitions were made, but the purchaser required the mortgage of 1848 and the other title-deeds to be obtained and handed over to him on completion.

Application was made by the vendors to Messrs. Talbot & Tasker to deliver up these earlier deeds, but they declined to

part with them, though claiming no lien on them, without the authority of the representatives of the mortgagees by whom they had been deposited, or until a reconveyance had been executed. A good deal of correspondence on the subject passed between the parties, and the vendors contended that, short of taking legal proceedings, they had done all in their power to obtain the deeds. They also offered the purchaser the use of their name, if he cared to bring an action, on his giving them an indemnity.

As the purchaser still declined to complete until these deeds were handed over to him, the vendors took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the requisitions and objections of the purchaser had been sufficiently answered by the vendors, and that a good title had been shewn in accordance with the contract.

*Farwell, Q.C.*, and *Mark Romer*, for the vendors. We are not bound under the terms of this contract to obtain possession of these deeds: that was the reason why the contract was in this form. We are not bound to bring an action at our own expense to recover these deeds. The purchaser on completion will have an equitable right to production of these deeds, and can obtain them for himself. Our inability to get them is no objection to our title. The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, sub-s. 3, is in our favour. It would be no blot on the title that the vendors were unable to give the purchaser a covenant for production. There is nothing in this contract inconsistent with s. 3, sub-s. 6, of the Conveyancing Act, 1881; therefore the purchaser must bear the expense of obtaining these deeds: *In re Stuart and Olivant and Seadon's Contract*. (1) We will bring an action for the deeds if the purchaser will indemnify us. Handing over the deeds is a question of title. We have done the best we could to obtain them, and, having failed, the purchaser must accept the best title we can give.

*Neville, Q.C.*, and *Sargant*, for the purchaser. Sect. 3, sub-s. 6, applies only to the expense of production and inspection

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(1) [1896] 2 Ch. 328.

ROMER J. for verification of the abstract: that is not what the purchaser wants; there is nothing in this section which interferes with the purchaser's ordinary right to have all the title-deeds handed over to him on completion. This is a question of completion, not one of title, and the provision in the contract as to accepting the "best title" does not touch this point.

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*Farwell, Q.C.*, in reply.

[ROMER J. Could you not find out who are the representatives of the mortgagees and get an authority from them to deliver up these deeds? Meantime I will reserve my judgment and see what can be done.]

*Farwell, Q.C.* The object of this contract was to avoid any expense or trouble of this kind, but inquiries shall be made.

1898. Feb. 12. ROMER J. The question raised by this summons concerns certain title-deeds of the property contracted to be sold. The purchaser is not asking to have these deeds produced for the verification of or for information as to the title, but is calling upon the vendors to fulfil the ordinary obligation they are under of handing over on completion all title-deeds in their possession or power. The Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 6, has, therefore, no application; for that sub-section only concerns the expenses of "production and inspection," and is not, in my opinion, intended to affect the ordinary right of a purchaser on completion to have the title-deeds handed over to him. See as to the limited operation of this sub-section the case of *In re Johnson and Tustin* (1), in which Cotton L.J. says (though, of course, with reference to the case then immediately before him) that the sub-section is dealing only with the expenses of requisitions made on the footing of the abstract by the purchaser, so far as he requires verification or information as to the title shewn thereby. Now, *prima facie* the deeds now in question are such as the vendors would in the ordinary course be obliged to hand over on completion to the purchaser. The deeds were deposited with certain mortgagees whose debt has since been paid off. If the debt had not been paid off the



vendors would have been bound on completion to obtain the concurrence of the mortgagees in the conveyance to the purchaser, and the deeds would then have been handed over. And the mere fact that the debt has been previously paid off can make no difference in the right of the purchaser to have the deeds handed over. Nor is there anything in the contract of sale which would take away this right of the purchaser. The provision that the purchaser is to accept the best title that the vendors can give certainly does not take away the purchaser's right. So far as I can see, no question of title is involved. If the vendors had been unable to obtain the deeds because of some defect of title which under the contract they were not bound to cure, different considerations would apply; but this is not the case. The mere fact that obtaining the deeds for the purpose of handing them over on completion may cause them trouble and expense is no answer to the purchaser. If the debt had not been paid off the vendors could not under this contract have excused themselves, because it would cause them trouble and expense to procure the mortgagees to join in the conveyance. But the case does not stop there; for the only ground raised by the vendors for not complying with the purchaser's request to have the deeds handed over is that they have applied to the solicitors who acted for the mortgagees, and that those solicitors decline to hand them over. Of course the solicitors will not hand over the deeds. The deeds do not belong to them, and they could not part with the deeds without the authority of the mortgagees or their representatives. So far as I can ascertain, no endeavour has been made by the vendors to obtain the authority of the mortgagees or their representatives to the solicitors to hand over the deeds. In order to try and prevent the possibility of future disputes between these parties, I suggested that the vendors should try and see if they could not ascertain who the mortgagees now living (if any) or their representatives were, and obtain their direction to the solicitors to hand over the deeds. And, of course, it is just possible that further investigation might shew some real difficulty as to title which would prevent the vendors handing over the deeds; and had that been shewn, I might

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ROMER J. have seen my way (subject to a question as to costs) to decide whether the difficulty was one that the vendors under this special contract were not bound to overcome, and so I might have prevented future disputes arising. But though time was given by me nothing of any importance has come of it, and I must now deal with the summons strictly on the materials before me. On those materials it appears to me that the vendors are not now in a position to call upon the purchaser to waive his claim to have the deeds handed over on completion; and I therefore dismiss the summons with costs.

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 JESSON'S  
 CONTRACT,  
*In re.*

Solicitors: *Rowcliffes, Rawle & Co., for Cousins & Burbidge, Portsmouth; Barlow & Barlow, for Stanton, Bassett & Stanton, Southampton.*

W. C. D.

ROMER J.

# HOBSON v. TULLOCH.

1898  
 Feb. 18.

[1898 H. 168.]

*Covenant—Private Residence—School—Boarding and Lodging Scholars attending School.*

A covenant not to use a house "for any trade or manufacture, or for any other purpose than a private residence," is broken by using it as a boarding-house for scholars attending a school in the neighbourhood kept by the owner of the house in question.

Such user practically converts the house from a "private residence" to the business of a boarding-house.

MOTION to restrain the defendant from using or occupying, or permitting to be used or occupied, a certain messuage or dwelling-house known as "Whitefriars," Chislett Road, West Hampstead, for the purpose of any trade or manufacture, or for any other purpose than a private residence.

The plaintiff being the owner in fee of certain premises known as "Runnymede," situate in West End Lane, West Hampstead, and also of the premises known as "Whitefriars" aforesaid, both houses forming part of the Cotton estate, a purely residential estate, in the year 1886 conveyed the latter premises to one John Saner, subject to a covenant on the part

of John Saner, his trustees and assigns, "not to use and occupy, or permit to be used or occupied, the said messuage or dwelling-house for the purpose of any trade or manufacture, or for any other purpose than a private residence." The conveyances to the plaintiff and to the owners of other houses on the estate contained a similar covenant.

In September, 1897, the defendant, who carried on a girls' school at Chester House, Greencroft Gardens, West Hampstead, distant about half a mile from "Whitefriars," purchased the fee of such house from the mortgagees of John Saner, and the same was conveyed to her. It appeared that "Whitefriars" was a large house containing nineteen bedrooms and seven reception-rooms.

The plaintiff, being under the impression that the defendant intended using the house as a day-school for girls, wrote to her on the subject, when she informed him that she did not intend to open a school upon the premises, or to affix to any part thereof any notice that she was carrying on a school there or elsewhere, or to advertise in newspapers, or by prospectus or otherwise, any connection between "Whitefriars" and Chester House School, that the prospectus she had lately had printed was headed "Chester House School, Greencroft Gardens," no mention whatever being made of "Whitefriars," and that the persons who would live at "Whitefriars" were herself and her sisters, four governesses, five nephews and nieces, the children of a married sister who was abroad, and such pupils as were sent to stay with her with the object of their attending Chester House School.

The plaintiff, being advised that the user of the premises by the defendant in the manner above mentioned would be a breach of the covenant not to use the house otherwise than as a private residence, commenced this action for an injunction; and it was agreed between the parties that the motion should be treated as the trial of the action, and that the decision should be final. It was admitted that the number of pupils intending to reside at "Whitefriars" would be limited, and that they would pay for their board.

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ROMER J. *Farwell, Q.C.*, and *T. F. Hobson*, for the plaintiff. A private residence means the residence of a family. This house will not be the residence of a family, but will be in fact a boarding-house.

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[*German v. Chapman* (1) and *Rolls v. Miller* (2) were cited.]

*Neville, Q.C.*, and *Gollan*, for the defendant. We submit that the intended user by the defendant of this house is not a breach of the covenant. She is going to use it simply as a private residence; she says she is not going to carry on the school there, but only to use it as a house for herself and her family, and the governesses of the school and such of the girls as are sent to live with her.

Under those circumstances she cannot be said to be carrying on a trade or business there. There is nothing to shew that it is anything but a private house occupied by a large family.

We submit that the motion must fail.

ROMER J. The question is whether using this house in the manner proposed is a breach of the covenant not to use the house for any other purpose than a private residence. In my opinion, if the defendant uses the house in the manner proposed she would really be carrying on the occupation of the house as a boarding-house, and not using it as a private residence in the ordinary acceptance of the term; she would, in fact, be carrying on a species of business.

The fact that the house is not to be advertised as a residence for pupils attending her school is to my mind unimportant.

I consider that if the defendant does what she proposes to do it would clearly be a breach of the covenant, and I so decide.

Solicitors: *Edwards & Cohen; W. Haigh.*

(1) (1877) 7 Ch. D. 271.

(2) (1884) 27 Ch. D. 71.

G. M.

*In re* LORD MONSON'S SETTLED ESTATES.

ROMER J.

*Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1—*Settled Land Act*, 1890 (53 & 54 Vict. c. 69), s. 11—*Settlement—Subsequent Settlement of other Land subject to Mortgages upon identical Trusts—Compound Settlement—Payment off of Mortgages by Mortgage of Lands comprised in both Settlements.* 1898  
Feb. 18, 19, 23.

Where an estate A has been settled, and afterwards by a separate instrument the equity of redemption in an estate B is settled on like trusts, the two settlements form one compound settlement within s. 2, sub-s. 1, of the *Settled Land Act*, 1882; and when the mortgage on estate B has to be paid off, the moneys required for that purpose may be raised by a mortgage upon both estates A and B by the tenant for life under s. 11 of the *Settled Land Act*, 1890.

*In re Mundy's Settled Estates*, [1891] 1 Ch. 399, and *In re Byng's Settled Estates*, [1892] 2 Ch. 219, discussed.

IN 1892 the bulk of the Monson family estates in the county of Lincoln stood limited under the will dated August 5, 1841, of the fifth Baron Monson, and a conveyance to the uses of that will dated November 9, 1889, to the use of William John Viscount Oxenbridge, seventh Baron Monson, for his life, with remainder to his first and other sons successively in tail male, with remainder to his brother Debonnaire John Monson for his life, with remainder to his first and other sons successively in tail male, with remainders over in strict settlement.

The rest of the Monson family estates in the county of Lincoln belonged at the beginning of that year to Viscount Oxenbridge in fee simple, subject to a mortgage thereon in favour of the Law Life Assurance Society for 52,650*l.*, and also to the payment of a jointure rent-charge to his wife, Viscountess Oxenbridge, in the event of her surviving him.

By an indenture dated January 30, 1892, Viscount Oxenbridge, in pursuance of a family arrangement made between him and his brother Debonnaire John Monson, conveyed the portion of the Monson family estates which belonged to him in fee simple, subject to the above-mentioned mortgage and jointure rent-charge, to the uses, on the trusts, and subject to the powers and provisions which were then subsisting with respect to the bulk



**ROMER J.** of the family estates settled by the will of the fifth Baron Monson and the indenture of November 9, 1889, but subject to a proviso enabling Viscount Oxenbridge to charge the portion of the estates comprised in the indenture of January 30, 1892, with the payment of certain annuities in favour of his younger brothers and sister.

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MONSON'S  
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—

The Marquis of Breadalbane and Lord Sandhurst, who had by a previous order of the Court been appointed trustees for the purposes of the Settled Land Acts of the settlement made by the will of the fifth Baron Monson and the indenture of November 9, 1889, were by the terms of the indenture of January 30, 1892, appointed to be trustees for the purposes of the said Acts of the settlement made by the last-mentioned indenture.

In 1897 the Law Life Assurance Society called in their mortgage, and, in order to pay them off, Viscount Oxenbridge proposed to raise the necessary moneys by mortgaging under the power conferred by s. 11 of the Settled Land Act, 1890, the estates comprised in the indenture of January 30, 1892, and also part of the estates subject to the original settlement made by the will of the fifth Baron Monson and the conveyance of November 9, 1889.

This was a summons asking for a declaration that he had power as tenant for life to do this. By an affidavit made by him in support of the application he stated that he was advised that the estates comprised in the deed of January 30, 1892, though worth more than the amount secured by the mortgage to the Law Life Assurance Society, did not, having regard to the depreciation in the value of the land, shew a sufficient margin to enable him to re-borrow the money upon the security of those estates only; but he stated that if a portion of the estates comprised in the original settlement made by the will of the fifth Baron Monson and the deed of November 9, 1889, were included in the security, another insurance company would lend the necessary money at a reduced rate of interest.

By the same affidavit he offered, if necessary, to procure a release of his wife's contingent jointure rent-charge, and to release also the power of appointing annuities in favour of his

younger brothers and sister reserved to him by the deed of January 30, 1892, and which power he had not exercised down to that time. Viscountess Oxenbridge, however, died pending the hearing of the summons, so that her jointure rent-charge never took effect.

The state of the family at the time of the hearing of the summons was as follows. Viscount Oxenbridge had no issue. His brother Debonnaire John Monson had issue an eldest son, Augustus Debonnaire John Monson, who was of age.

Both Debonnaire John Monson and his son Augustus Debonnaire John Monson approved of the proposed mortgage, and supported the application.

The summons was served upon them and upon the trustees, the Marquis of Breadalbane and Lord Sandhurst.

*Farwell, Q.C.*, and *F. L. Wright*, for the applicant. The two instruments constitute, within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882, one settlement for the purposes of the Settled Land Acts. It follows from the decisions in *In re Mundy's Settled Estates* (1) and *In re Byng's Settled Estates* (2) that, if the estate settled by the deed of November 9, 1889, had been subject to the mortgage, then the money to pay off that mortgage might have been raised by mortgage on the estate settled by the deed of January 30, 1892. That being so, the two deeds constituting one settlement, the converse must hold good.

[They also referred to *Hampden v. Earl of Buckinghamshire* (3) and *In re Freme*. (4)]

*Onslow*, for Debonnaire John Monson and Augustus Debonnaire John Monson.

*Neville, Q.C.*, and *Ribton*, for the trustees. There is no authority to be found in support of the present application; and if it were acceded to a tenant for life who is also owner in fee of land subject to incumbrances for which he is personally liable might, by throwing this land into the settlement, raise out of the whole of the property an amount sufficient to

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(1) [1891] 1 Ch. 399.

(2) [1892] 2 Ch. 219.

(3) [1893] 2 Ch. 531.

(4) [1894] 1 Ch. 1.

ROMER J. discharge the incumbrances and relieve him from personal liability. It is not suggested that this case is one of that kind ; but, inasmuch as under s. 11 of the Act of 1890 the tenant for life could act without the sanction of the Court, the case suggested might arise.

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*In re.*

The reported cases simply shew that the original settlor may, after the settlement, throw other land by way of accretion into the original settlement so as to form one estate, and do not go further.

*Farwell, Q.C., in reply.*

*Cur. adv. vult.*

Feb. 23. ROMER J. In my opinion, it would be clearly beneficial to the settled estates as a whole that this application should be complied with ; and the question is whether there is power under the Settled Land Acts to do what is required. Subject to the release by the applicant of the power to charge annuities, the estate settled by the deed of January 30, 1892, is now subject to the same uses and is held upon the same trusts as the estate settled by the deed of November 9, 1889. The applicant has offered to release the above-mentioned power, and I proceed subject to that being done.

The legal point arising may be thus stated. Estate A is first settled, and later on by a separate instrument the equity of redemption in estate B is settled in a similar, though not identical, way ; and then, owing to subsequent events, estate B, subject to its mortgage, comes to be settled in identically the same way as estate A. The question is whether, under the Settled Land Acts, when the mortgage on estate B has to be paid off by a fresh mortgage, and it is advantageous to all those interested in the estates under the settlement, the fresh mortgage may not be upon both estates A and B.

Now, it was held in *In re Mundy's Settled Estates* (1) by the Court of Appeal that where an estate was settled by deed, and then subsequently by a will moneys were directed to be laid out in the purchase of land to be settled in the same way as the estate, the moneys could be applied as capital moneys under

the Act in improvements on the settled estate, the short ground for the decision being that the settlement and will constituted one settlement under s. 2, sub-s. 1, of the Act of 1882; and, following the broad principle laid down in that case, North J. in *In re Byng's Settled Estates* (1) held that where land was settled by will, and then by deed money was settled in trust to purchase land to be settled on limitations identical with those of the will (though not by reference to the will), except that two terms of years were interposed, when the trusts of the terms became satisfied the will and deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements on the land devised by the will. It follows from these cases that in the case before me, if estate A had been subject to the mortgage and not estate B, the fresh mortgage to pay off might have been on estate B. But it is said that the converse does not hold good, and though estate B might be used for the purposes of estate A, yet estate A cannot be used for the purposes of estate B. It appears to me that this distinction is unsound. The principle on which *In re Mundy's Settled Estates* (2) was decided appears to me to be that where you have two estates settled in the same way, though by different instruments, yet for the purposes of the Settled Land Acts the two estates are to be regarded as one, the instruments taken together being the settlement under s. 2, sub-s. 1, of the Act of 1882. It seems to me wrong in principle to say, that if for the purposes of the Settled Land Acts in dealing with estate B you are to regard it as one with estate A, yet in dealing with estate A you are not to regard it as one with estate B. Take the circumstances of *In re Mundy's Settled Estates* (2), and suppose that after some of the moneys had been used for the purposes of the settled estate and the balance invested in land, this land wanted improvements, but had no capital money available to make them, while the former or first settled estate had such money, could it be said that though the first estate had been aided by the second, yet no return could be made when the second wanted to be aided by the first? I think not. I see no

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 MONSON'S  
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(1) [1892] 2 Ch. 219.

(2) [1891] 1 Ch. 399.

ROMER J. sufficient reason for the distinction. The only ground suggested for making a distinction is that to allow that a second estate may be settled in the same way as a prior estate so as to become one with it for all purposes under the Settled Land Acts might lead to acts of fraud. It is suggested that a mortgagor of estate B who is tenant for life of settled estate A might settle the worthless equity of redemption of estate B, and then free himself from his personal liability as mortgagor by getting estate A to pay the mortgage debt. But in reality such a case of fraud could not practically be carried out; for, apart from the difficulty of getting trustees appointed or to accept office on the settlement of a worthless property like estate B before any mortgage of estate A could be made, notice would have to be given to the trustees under s. 45 of the Act of 1882, and they would at once put a stop to the attempted fraud by obtaining an injunction, as in the case of *Hampden v. Earl of Buckinghamshire*. (1)

The utility of the decision in *In re Mundy's Settled Estates* (2) ought not to be interfered with by mere suggestions that frauds might possibly be attempted. Frauds might be attempted in many ways by tenants for life under the ordinary provisions of the Settled Land Acts, but that consideration did not prevent the Acts being passed and being useful. In ordinary cases where two estates are settled in the same way it is most useful to the beneficiaries that the two should be treated together for the purposes of the Settled Land Acts, and I think it would impair the usefulness of the Acts to limit it in the way contended for before me. I therefore decide that, subject to the power to appoint annuities being released, what is proposed may be lawfully done.

Solicitors: *Stileman, Neate & Toynbee, for Toynbee, Larken & Toynbee, Lincoln; Crawley, Arnold & Co.*

(1) [1893] 2 Ch. 531.

(2) [1891] 1 Ch. 399.

G. M.



*In re* WOODS AND LEWIS' CONTRACT.

ROMER J.

*Vendor and Purchaser—Contract for Sale—Delay in Completion—Defect in Title unknown to Vendor—"Default"—Interest.*

1898

Feb. 26;  
March 4.

Delay in the completion of a purchase by the day fixed by the contract, occasioned by the time occupied in remedying a defect in the vendor's title which was not and could not be known to him at the time of entering into the contract, is not attributable to a "default" on his part so as to prevent interest running against the purchaser under a clause in the contract for payment of interest by the purchaser "if from any cause whatever other than the default of the vendor" the purchase should not be completed by the day fixed.

*In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, and *In re Hetling and Merton's Contract*, [1898] 3 Ch. 269, distinguished.

By an agreement dated July 26, 1897, between Woods of the one part and Lewis of the other part, certain leasehold hereditaments in Berkeley Square were agreed to be sold for the price of 12,500*l.*, and it was provided that all objections and requisitions in respect of the title should be delivered to the vendor's solicitors within fourteen days from the delivery of the abstract. By clause 9 it was provided that the purchase should be completed on August 31, 1897, when the vendor should execute a proper assurance to the purchaser, such assurance, and every other assurance and act (if any) required by the purchaser for perfecting and completing the vendor's title, to be prepared and done by and at the expense of the purchaser.

Clause 10 provided that "if from any cause whatever other than the default of the vendor the purchase shall not be completed on the said 31st day of August, the purchaser shall pay to the vendor interest after the rate of 4*l.* per cent. per annum on the residue of the purchase-money from that day until the completion of the purchase." The purchaser paid 1250*l.* as deposit.

The vendor at the date of the contract had recently purchased the premises from the Standard Life Assurance Company, the assignment to him being dated June 1, 1897, and executed by the manager and three directors of the company.

ROMER J.      An abstract of title was delivered to the purchaser on July 30, 1897, and among the requisitions delivered by him was one with regard to the execution of the deed of June 1, 1897, that it had not been executed by the proper parties in accordance with the private Act of Parliament of the company, and that there must be a deed of confirmation executed by the proper person in accordance with the Act.

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WOODS AND  
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*In re.*

The requisition so raised formed the subject of correspondence, and on September 7 the vendor's solicitors informed the purchaser's solicitors that they would procure a confirmatory deed, and requested them to send the draft for approval, which was sent on September 21; but, owing to circumstances, the deed was not executed by the proper officer of the company till November 2, and was not sent to the vendor for execution till November 18, and the assignment to the purchaser was not completed till November 24, 1897.

The vendor claiming interest from the day fixed for completion till November 23, 1897, and the purchaser declining to pay it on the ground that the delay had occurred from the default of the vendor, this summons was taken out by the vendor for a declaration that there had been no default on his part, and that the purchaser should be ordered to pay interest on the balance of the purchase-money from August 31, 1897, to the day of completion.

*Farwell, Q.C.*, and *Cave*, for the vendor. There was no default on the part of the vendor within the meaning of clause 10. At the date of the contract he did not and could not know of the defect in his title. Directly it was brought to his notice he took steps to remedy it. The subsequent delay was brought about by the purchaser, who did not deliver the draft of the confirmation deed till September 21; if he had delivered it earlier it would have been engrossed and executed at once. *Sherwin v. Shakspear* (1), *Williams v. Glenton* (2), and *In re Mayor of London and Tubb's Contract* (3) are all in our favour, and we submit that the purchaser is bound to pay interest.

(1) (1854) 5 D. M. & G. 517.

(2) (1866) L. R. 1 Ch. 200.

(3) [1894] 2 Ch 524.

*Neville, Q.C.*, and *J. W. M. Holmes*, for the purchaser. The delay has arisen from the default of the vendor. He was bound to know of the defect in his title, and it was his duty to deliver a proper abstract. We rely upon *In re Young and Harston's Contract* (1) and *In re Hetling and Merton's Contract* (2), and submit that the vendor is not entitled to interest.

Under any circumstances the vendor must pay the costs occasioned by the deed of confirmation: *Stronge v. Hawkes*. (3) *Farwell, Q.C.*, in reply.

*Cur. adv. vult.*

March 4. ROMER J. I will assume in this case that the delay in completion has been caused solely by the defect in the vendor's title. But the defect was clearly not known to the vendor at the date of the contract, nor was the defect so obvious as to make ignorance on his part inexcusable or unreasonable, and the question is whether under the circumstances I ought to hold that the delay has been caused by the vendor's "default," within the meaning of that word as used in clause 10 of the contract. The meaning of that word has been described by Bowen L.J. in *In re Young and Harston's Contract* (4) as follows: "'Default' is a purely relative term, just like 'negligence.' It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." I accept that description, and apply it to the case before me. It is clear that when the defect of title was pointed out by the purchaser there was no undue delay on the part of the vendor in complying with the purchaser's requisitions and trying to cure the defect. So that the imputation of default in this case to the vendor can only be justified by holding that under the circumstances of a contract for the sale of land or an interest in land it is reasonable to assume, for the purpose of the clause as to interest, that the vendor is

ROMER J.

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WOODS AND  
LEWIS'  
CONTRACT,  
*In re.*

(1) 31 Ch. D. 168.

(2) [1893] 3 Ch. 269.

(3) (1856) 2 Jur. (N.S.) 388.

(4) 31 Ch. D. 174.

ROMER J. bound or must be taken to know every possible defect of his title.

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CONTRACT,  
*In re.*

Now, when I consider the state of the laws of this country concerning land, and the difficulties under which even a perfectly honest and careful vendor labours, it does not appear to me to be reasonable to impute to him knowledge of all possible defects of title for the purpose of such a clause as I am considering. I do not consider that ignorance of such a defect of title as existed in this case amounted to a "default" on his part within the meaning of that word as used in the clause. In several cases it has been pointed out that delay arising from such ignorance on the part of a vendor of land did not amount to "wilful default" on his part. See, for example, the observation of Knight Bruce L.J. in *Williams v. Glenton*. (1) No doubt he was there dealing with a case where the interest clause made interest payable if delay occurred "from any cause whatever," but it had been previously settled that the generality of those words did not allow a vendor to claim the interest where delay occurred by his "wilful default." And when the grounds are considered on which it has been held in the above cases that ignorance of defect of title did not amount to "wilful default," it appears to me that those grounds apply to the case before me, and shew that the vendor ought not to be held guilty of "default." The cases relied on by the respondent before me are clearly distinguishable. In *In re Young and Harston's Contract* (2) the delay occurred owing to the vendor going abroad two days before the time known by him to have been fixed for the completion of the purchase. And the case of *In re Hetling and Merton's Contract* (3) turned upon this—that the vendor knew at the date of the contract certain facts from which it was inferred by the Court he ought to have gathered that the purchase could not, or probably would not, be completed by the date fixed for completion. The grounds for that decision are clearly stated by the present Master of the Rolls as follows (4): "If a vendor knows the material facts—knows that [there are difficulties which it is his duty to overcome—

(1) L. R. 1 Ch. 200, 206.

(2) 31 Ch. D. 168.

(3) [1893] 3 Ch. 269.

(4) Ibid. 281.

knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time, although no fresh unforeseen occurrence prevents him from doing so, the delay caused by such failure on his part is attributable to his wilful default in the sense in which that expression is used in contracts of this description; and his right to interest during such delay is excluded. The vendors here knew all the facts; but they hoped that the power of attorney would enable them to remove the difficulty occasioned by the facts with which they were fully acquainted. This hope and the mistake they made are not enough to enable the Court to hold that there was no wilful default on their part."

I may add that there is in the case before me no great hardship in holding the purchaser liable to pay interest, for he did not, as the purchaser did in *In re Hetling and Merton's Contract* (1), have his money ready to complete at the proper time and keep it ready, making no interest of it. I therefore hold that the vendor is entitled to interest.

With regard to the costs of the confirmation deed, it appears to me that they are clearly provided for by clause 9 of the contract and must be paid by the purchaser, and he must pay the costs of the summons.

Solicitors: *Hulberts, Hussey & Metcalfe; Ingle, Holmes & Sons.*

(1) [1893] 3 Ch. 269, 281.

G. M.

ROMER J.

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LEWIS'  
CONTRACT,  
*In re.*



BYRNE J.

1898

Jan. 22;  
Feb. 12.*In re* JONES.  
RICHARDS *v.* JONES.

[1897 J. 2726.]

*Will—Absolute Gift—Subsequent Gift over of Portion undisposed of in  
Legatee's Lifetime.*

By his will, subject to payment of his debts and funeral and testamentary expenses, a testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give . . . the same" in trust for sale for the benefit of other persons. The wife was also appointed sole executrix. On the testator's death his widow took possession of his estate, and his debts and funeral and testamentary expenses were paid during her lifetime. At her death a considerable part of the estate remained unsold and undisposed of:—

*Held*, that the widow took an absolute interest, and that the part undisposed of passed by her will.

*In re Pounder*, (1886) 56 L. J. (Ch.) 113, distinguished.

JOHN JONES made a will dated April 19, 1890, which, so far as the same is material, was as follows: "Subject to the payment of my debts, funeral and testamentary expenses I give, devise and bequeath all my real and personal estate of whatsoever kind or nature unto my wife Jane Jones for her absolute use and benefit so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death as to such parts of my real and personal estate as she shall not have sold or disposed of as aforesaid subject to the payment of my wife's funeral expenses I give devise and bequeath the same unto my brother Owen Jones and my wife's sister Mary Jones Upon trust to sell and convert the same into money and to divide the capital thereof into five equal shares and portions and to pay such shares or portions to the following persons namely one-fifth share to my brother the said Owen Jones absolutely, one-fifth share to and among the children of

my deceased brother Thomas Jones absolutely and equally, one-fifth share to my sister Ann Williams absolutely, one-fifth share to the children of my wife's sister Elizabeth Williams absolutely and equally, and the remaining fifth share to my wife's sister the said Mary Jones absolutely. And I appoint my said wife Jane Jones sole executrix of this my will. In witness " &c.

The testator died on February 5, 1891, and on March 3, 1891, his will was proved by his executrix, Jane Jones.

The testator died possessed of considerable personal estate, more than sufficient to pay his debts and funeral and testamentary expenses.

Jane Jones, on his death, took possession of the personal estate, and in her lifetime all the testator's debts and funeral and testamentary expenses were paid off. She did not sell or dispose of the whole of the estate, and at her death a considerable portion of the estate was left undisposed of.

She died on September 28, 1897, having by her will dated June 2, 1896, after making certain specific bequests, appointed Hugh Jones her sole executor and residuary legatee. Hugh Jones proved this will on November 2, 1897.

Jane Richards, a daughter of Elizabeth Williams, issued an originating summons against Hugh Jones for a declaration that Jane Jones took a life interest only in the testator's estate, with power of disposition by act inter vivos only and for the purpose of her maintenance and support, and that on her death such part of the estate as she did not so dispose of for the purpose aforesaid passed under the residuary gift over in the testator's will.

The summons was adjourned into court, and was heard by Byrne J. on January 22 and February 12, 1898.

*Eve, Q.C.*, and *MacConkey*, for the applicant. Although the gift is in the first place absolute, it is qualified or cut down by the subsequent words so as to give only a life interest with a power of disposition in the legatee's lifetime only, there being a valid gift over of what is left undisposed of by the legatee on her death: *In re Thomson's Estate* (1); *In re Pounder*. (2)

(1) (1879) 13 Ch. D. 144; (1880) 14 Ch. D. 263. (2) 56 L. J. (Ch.) 113.

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*v.*  
JONES.

BYRNE J. *Astbury, Q.C., T. R. Hughes, and J. Arthur Price, for the*  
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 JONES, *defendant. In In re Thomson's Estate* (1) there was no gift of  
*In re,* corpus in express terms, but an express gift for life with a  
 RICHARDS power to dispose of the same during her lifetime. In *In re*  
*v.* *Pounder* (2), although there was originally an absolute gift of  
 JONES. corpus, this was revoked by a codicil which gave the legatee a  
 life interest only with a power of disposition inter vivos.

There can be no valid gift over of so much as a legatee does not dispose of, when, as in this case, an absolute interest has once been given to the legatee: Theobald on Wills, 4th ed. p. 519.

Where there is an absolute gift, a direction to sell and divide on the legatee's death is repugnant and void: *Bowes v. Goslett*. (3)

In that case there was a simple gift for a woman's separate use, but the superaddition of a power to spend or dispose of the property during the legatee's lifetime makes no difference; the gift over is even then void: *Henderson v. Cross* (4); *Watkins v. Williams* (5); *In re Wilcock*. (6)

[They also referred to *In re Stringer's Estate* (7); *In re Adam's Trusts* (8); *Parnall v. Parnall* (9); *In re Elliot*. (10)]

*Eve, Q.C.*, in reply. The words of the particular will must be looked at. The intention is to be sought for in the words of the gift taken as a whole. Here the gift is in the first place absolute, but that interest is cut down by subsequent words to a life interest with a power of disposition limited to the legatee's lifetime and for certain specified purposes. In such cases there is no repugnancy, and the gift over attaches as regards what is left: *Bibbens v. Potter* (11); *Constable v. Bull*. (12) [He also referred to *Gravenor v. Watkins* (13); *In re Sheldon & Kemble* (14); *In re Holden*. (15)]

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| (1) 13 Ch. D. 144; 14 Ch. D. 263. | (8) (1865) 14 W. R. 18.        |
| (2) 56 L. J. (Ch.) 113.           | (9) (1878) 9 Ch. D. 96.        |
| (3) (1857) 27 L. J. (Ch.) 249.    | (10) [1896] 2 Ch. 353.         |
| (4) (1861) 29 Beav. 216.          | (11) (1879) 10 Ch. D. 733.     |
| (5) (1851) 3 Mac. & G. 622.       | (12) (1849) 3 De G. & Sm. 411. |
| (6) Ante, p. 95.                  | (13) (1871) L. R. 6 C. P. 500. |
| (7) (1877) 6 Ch. D. 1.            | (14) (1885) 53 L. T. 527.      |
| (15) (1888) 57 L. J. (Ch.) 648.   |                                |

BYRNE J. (after stating the terms of the will). The question arises between a person claiming under the will of Jane Jones and persons claiming under the gifts purported to be made by the testator to take effect after the death of Jane Jones, and the question really is whether Jane Jones took an absolute interest in this property or only a more limited interest, so that the disposition of the testator's will should take effect at her death.

There are one or two rules which the Court is obliged to observe in construing wills containing gifts of this class. It is clear that if a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. There is a principle also which one must observe—represented in a class of cases like *Constable v. Bull* (1)—that, although the words are absolute in the first instance, you may find subsequently occurring words sufficiently strong to cut down the first apparent absolute interest to a life interest. Then there have been a great many decisions—although I do not propose to refer to more than one of them—in cases in which the testator has given an absolute interest in the first instance and has superadded words indicating that the person taking that interest is to have a power of disposition, and then has followed that up by purporting to give what shall remain, or what may not have been disposed of by the first taker. After all, in all these cases it is a question of construction ; but the law requires that if there is an absolute gift in the first instance, you must have clear words to cut down that estate. Now I proceed to consider what the testator has done here. He has first of all given this property to his wife for her absolute use and benefit. It is true that he has only given it her in the same sentence with the qualifying words, “so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely.” Whether we regard the words “so that” as meaning “to the intent that,” or “my object being that” during her lifetime she shall have this power, it appears to me that I cannot read

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BYRNE J. them as cutting down the previous words. They are words appearing to be expressive of the object of his having made the absolute gift. If this be the true construction of these words, I think that, having referred to the authorities, I must come to the conclusion that the gift which the testator purports to make to take effect after his wife's death fails, and that the wife takes an absolute interest.

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Certain difficulties have been urged, and I have felt them press upon me a good deal. Amongst other things, the words following on the gift, "for her absolute use and benefit," are not in general terms giving her a power of disposition, but mention a particular purpose—that is, "for her maintenance and support"—and seem to contemplate only a power of disposition during the lifetime, and not to contemplate that his wife should have power to dispose of the property by will. But after giving the very best consideration I can to this case, and having listened to the numerous authorities and the able arguments which have been addressed to me on it, I feel that I should be departing from the rules of construction which have been laid down if I came to a conclusion other than the one which I have arrived at.

As I have said, I do not consider it necessary to refer to more than one of the authorities. I mean *In re Pounder*. (1) As I think was said in that case, and as has been said at all events in many others, these questions reduce themselves to questions of construction of the particular instrument, having regard to general rules governing the construction of wills. *In re Pounder* (1) came before Kay J. The testator had first of all given all the residue of his property to his wife absolutely, and then made a codicil to his will. He commenced the codicil by saying: "Now I hereby revoke the said gift." Then, after referring to the gift of the residue contained in the will, he made a fresh disposition in terms which, but for that revocation, might have been considered to give the wife the estate absolutely over again. At the very commencement of his judgment Kay J. said: "The testator, by his will, gave all his residue to his wife absolutely, and by his codicil he revoked



that gift and made other gifts to her. He must have intended by the change of phrase to confer a different interest upon her.”

Now, this element is here totally wanting, and no doubt it was a very guiding and leading element in the consideration of that case. If I had found in the first part of this will a gift to the wife absolutely, and then in a codicil I had found, in reference to that gift, that the testator began by saying, “I revoke the gift to my wife absolutely,” I should very likely have put a construction upon the will and codicil quite different from that which I have put upon the present will. One may have suspicions in these cases as to what testators may have meant; but, of course, one cannot depart from the great leading principle that we must take the words as we find them, and put an interpretation on the will. You may look at the whole will in order to find it, but you must take it from the will itself.

I must therefore declare that Jane Jones took an absolute interest in the testator’s real and personal estate.

Solicitors for plaintiff: *Horrocks & Christian Jones, Liverpool.*

Solicitor for defendant: *Alfred Stephenson, Liverpool, for D. Owen & Griffith, Bangor.*

F. E.

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v.  
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WRIGHT J.      *In re* LAND MORTGAGE BANK OF FLORIDA.

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 Feb. 2.

Company—Winding-up—Liquidator—Companies Liquidation Account—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 15, sub-s. 3—Companies Winding-up Rules, 1890, r. 127D.

In December, 1895, a limited company, being unable to pay the interest on its debentures, went into voluntary liquidation. On April 15, 1896, the Court sanctioned a scheme under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), which provided that the uncalled capital of the company should be called up by the voluntary liquidators, and that they should thereout, by September, 1897, pay sums amounting to a dividend of 12s. 6d. in the pound to the debenture-holders, the balance being payable in 1902, and the interest being kept down in the meantime. Any surplus from calls, after payment of the first dividend, might be applied, according to the liquidators' discretion, for management and other expenses. The scheme also gave the liquidators power to borrow for the purpose of protecting and developing the assets. On the debenture-holders being paid off the winding-up was to be stayed, and the company was to resume business. By a trust deed executed in pursuance of the scheme the liquidators covenanted to apply the proceeds of the call in accordance with the scheme. In May and September, 1897, the liquidators filed with the Registrar of Joint Stock Companies the statements of account required by s. 15 of the Companies (Winding-up) Act, 1890, but they refused to pay into the Companies Liquidation Account the surplus of calls shewn by the accounts to be still in their hands or under their control, although directed to do so by the Board of Trade. On a motion by the Board for an order to comply with its direction:—

Held, that the money was not "undistributed assets" within s. 15, sub-s. 3, of the Act of 1890, and that the liquidators could not be called on to pay it into the Companies Liquidation Account.

THE Land Mortgage Bank of Florida, Limited, was registered in 1889 under the Companies Acts, 1862 to 1886, its objects being (*inter alia*) to borrow money on debentures and deposit receipts secured upon its present and future property, including uncalled capital, and to lend the money so borrowed, together with the available capital of the company (except its reserve fund), upon the security of mortgages of land in the State of Florida, and other of the United States of America. The company raised large sums of money by the issue of terminable debentures ranking *pari passu* on its undertaking

and assets, including its uncalled capital, and made large advances on lands and orange groves in Florida and other States. WRIGHT J.

Great destruction among the orange groves was caused by frost in December, 1894, and February, 1895, and in consequence of the depression which ensued the company was unable to pay the interest on its debentures.

After an action to enforce the debentures had been commenced, an extraordinary resolution was passed on December 20, 1895, for the voluntary winding-up of the company, and the voluntary liquidators were in February, 1896, appointed receivers and managers in the action.

The unsecured debts of the company were small, and a large amount of capital remained uncalled.

It being considered that delay in realization of the assets was advisable, a scheme of arrangement was sanctioned by the Court on April 15, 1896, under the Joint Stock Companies Arrangement Act, 1870.

The scheme provided that the liquidators should (clause 1) call up the unpaid capital by instalments payable on April 9, 1896, January 1, 1897, and July 1, 1897; (clause 5) pay dividends to the debenture-holders in three instalments during 1896 and 1897 amounting altogether to 12s. 6d. in the pound; (clause 8) apply the proceeds of calls in paying the costs and expenses of winding-up, the receivers and liquidators' remuneration, the unsecured creditors, and the dividends to the debenture-holders.

Clause 9 provided that if, after payment of any dividend on the debentures, there should be a surplus of calls in the hands of the liquidators, they "may at any time before a further dividend on the existing debentures shall have become due, apply such surplus in or towards any of the following purposes in such order of priority and manner as the liquidators think fit: [namely, (a) in payment of certain wages, salaries, and remuneration; (b) in payment of taxes, charges, and liens ranking in priority to the debentures; and] (c) any expenditure which the liquidators may think necessary or expedient for protecting and keeping up the company's property and assets,

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WRIGHT J. or of developing the same with a view to the realization thereof."

Clause 10 gave power to the liquidators from time to time to borrow money on new debentures constituting a first charge.

Clause 13 gave the liquidators liberty to grant extensions of time for payment, and to enter into contracts for sale.

Clause 14 provided for payment by the liquidators of interest on the debentures.

Clause 15 was as follows: "The liquidators shall, on or before the 1st of March, 1902, by a single payment or by instalments, as they may find convenient, pay to the holders of the existing debentures the balance of principal owing on their debentures."

By clauses 20 and 23 a trust deed to effectuate the scheme relating to the existing debentures was to be prepared and executed, and to be in such form as should be settled by the counsel named in the scheme, or, failing him, by some other counsel approved by the winding-up judge.

Clause 25 was as follows: "As soon as the whole of the payments in respect of the existing debentures hereinbefore provided for shall have been made, such debentures shall be given up to the liquidators to be cancelled, and this scheme and all the provisions hereof shall cease and shall not have any further or future operation, and all further proceedings in the voluntary winding-up of the company shall be stayed."

A trust deed was executed in accordance with the scheme by which, after provisions relating to the dividend of 12s. 6d., the liquidators covenanted to apply the proceeds of calls in accordance with the scheme and not in any other manner.

The liquidators exercised the borrowing powers, and paid the dividend of 12s. 6d., and kept down the interest on the debentures, and expended and expected to further expend moneys in protecting and developing the assets, remittances to Florida having frequently to be made with the utmost despatch.

On May 1 and September 7, 1897, the liquidators deposited with the Registrar of Joint Stock Companies the statements of account required to be so deposited by s. 15 of the Companies (Winding-up) Act, 1890.

From the accounts it appeared that the liquidators had had **WRIGHT J.** in their hands or under their control for six months after the date of their receipt moneys to the amount of £13,594.

The Board of Trade requested the liquidators to pay this amount into the Companies Liquidation Account in pursuance of s. 15 of the Act of 1890 and rule 127D (2.) of the Companies Winding-up Rules, 1890. (1)

On the liquidators refusing to comply with this request, the Board of Trade served notice of motion on them for an order to pay the amount into the Companies Liquidation Account within four days after service of the order to be made on the motion.

(1) "(1.) If the winding-up of a company is not concluded within one year after its commencement, the liquidator of the company shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the Registrar of Joint Stock Companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation. . . ."

"(3.) If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England . . ." (53 & 54 Vict. c. 63, s. 15).

"(1.) All money in the hands or under the control of a liquidator of a company representing unclaimed dividends, which for six months from the date when the dividend became payable have remained in the hands or under the control of the liquidator,

shall forthwith, on the expiration of the six months, be paid into the Companies Liquidation Account.

"(2.) All other money in the hands or under the control of a liquidator of a company, representing unclaimed or undistributed assets, which under sub-s. 3 of s. 15 of the Companies (Winding-up) Act, 1890, the liquidator is to pay into the Companies Liquidation Account, shall be ascertained as on the date to which the statement of receipts and payments sent in to the Registrar of Joint Stock Companies is brought down, and the amount to be paid to the Companies Liquidation Account shall be the minimum balance of such money which the liquidator has had in his hands or under his control during the six months immediately preceding the date to which the statement is brought down, less such part (if any) thereof as the Board of Trade may authorize him to retain for the immediate purposes of the liquidation. Such amount shall be paid into the Companies Liquidation Account within fourteen days from the date to which the statement of account is brought down." (Rule 127D of Companies Winding-up Rules, 1890, being Rule 5 of April, 1891.)

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WRIGHT J. The evidence shewed that the amount had been paid by the liquidators into a bank.

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*Ingle Joyce*, for the Board of Trade. There is no dispute as to the amount in the hands of the liquidators. The money is "undistributed assets," and must therefore be paid to the Companies Liquidation Account, as required by s. 15 of the Act of 1890 and rule 127D (2.) of the Companies Winding-up Rules, 1890.

*Tindal Atkinson, Q.C.*, and *Theobald*, for the liquidators. The words of s. 15, sub-s. 3, of the Act of 1890 are taken from s. 162 of the Bankruptcy Act, 1883. The liquidators have no "unclaimed or undistributed assets" in their hands or under their control. The assets are being liquidated under and are controlled by a scheme which has been sanctioned by the Court under the Joint Stock Companies Arrangement Act, 1870—a totally different thing from a reconstruction under s. 161 of the Companies Act, 1862. The liquidation is at present for the benefit of the debenture-holders only, and when they have been paid off the winding-up will be stayed and the company will go on as before. The liquidators are in the same position as receivers and managers in a debenture-holders' action, and the charge of the debenture-holders is, therefore, no longer a floating security, but is a fixed one. In pursuance of the scheme, as sanctioned by the Court, a trust deed has been executed by which the liquidators have covenanted to apply the moneys according to the scheme. To be "undistributed" within the meaning of s. 15 the assets must be capable of being distributed, and not as in this case appropriated with the sanction of the Court to other purposes.

The scheme gives the liquidators a certain discretion as to how the money in their hands is to be applied, but if the order asked for is made this discretion will be taken away from them and given to the Board of Trade, and the fund to be applied in a specified way will to some extent be diverted to the payment of fees to the Board of Trade. Moreover, the liquidators would have to apply to the Board of Trade for a payable order before making any payment under the scheme.

[They also referred to s. 2 of the Joint Stock Companies Arrangement Act, 1870, and Board of Trade Form 17A. (1)]

*Ingle Joyce*, in reply. The argument of the respondents is the inconvenience and absurdity of the provisions of the Act of 1890. Sect. 18 of the Act of 1890 provides for interest being payable on the amount paid in. No inconvenience is, in fact, caused by money being in the Companies Liquidation Account. The scheme, it is true, enables the liquidators to carry on the company's business, but the same power may be given in any compulsory winding-up, and in a voluntary winding-up may be exercised without the sanction of the Court.

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It is a mere question of the money being in proper custody.

The proceeds of calls are an asset, and that asset is undistributed. The Act and Rules plainly require that the liquidators shall pay the money in to the account named, and their provisions must be obeyed.

WRIGHT J. I think that the application fails. A scheme has been sanctioned by the Court under the Joint Stock Companies Arrangement Act, 1870, and by virtue of the last words of the 2nd section of the Act the scheme when so sanctioned became binding on all the creditors or class of creditors named, and also on the liquidators and contributories of the company. The material provision of the scheme for the present purpose is paragraph 9, which provides that the liquidators, if after making payment of any dividend on the debentures there is a surplus of money in their hands, "may, at any time before a further dividend on the existing debentures shall have become due, apply such surplus in or towards any of the following purposes in such order of priority and manner as the liquidators think fit." Then, in sub-clause (c) are the following words: "Any expenditure which the liquidators may think necessary or expedient for protecting and keeping up the company's property and assets, or of developing the same with a view to the realization thereof." Then by the scheme a trust deed is to be prepared to give effect to its provisions, and that is to be settled by counsel and approved by the Court. The

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WRIGHT J. trust deed has been prepared and settled, and the trust deed provides, among other things, for the application of moneys in the hands of the liquidator to the very purpose to which they are being applied, namely, the maintenance and development of the property which is subject to future realization. Then comes the Act of 1890, which, by s. 15, sub-s. 3, provides that, if it appears in a certain way that the liquidator has in his hands or under his control any money representing unclaimed or undistributed assets which have remained so for six months, he is to pay them into the Companies Liquidation Account. It is not suggested that the sums in the hands of the liquidator are unclaimed assets: they are said to be undistributed assets. The short ground on which it seems to me the application fails is that the scheme appears to me to have the effect of making these assets not distributable assets—that is to say, not distributable really, not in the sense that they are not ready for distribution—because, as Mr. Ingle Joyce points out, that would be making nonsense of the Act and making the Act ineffectual—but in the sense that some legal event has happened which has applied them otherwise than for the purpose of distribution.

Now, it seems to me that on the facts I must give credit to the liquidators' statement that the money is wanted for the purposes of clause 9, sub-cl. (c), of the scheme and for the purposes of the trust deed sanctioned under the scheme, and therefore the scheme governs it. It seems to me the special legislation relating to a scheme ought not to be held to be overridden by the general legislation relating to the Companies Liquidation Account. The scheme has been approved and it has not been appealed against, and I think effect ought to be given to it. If the application were well-founded, it would mean that it would be competent for the Board of Trade, and probably would be their duty *prima facie*, to collect all the moneys of this kind in the hands of the liquidator, and they alone would have the power under the rules of letting out some of it as they thought fit. But that would be to take the discretion, as regards the application of these moneys for the development and preservation of the estate, out of the hands of the liquidator in whom it is vested by the scheme and trust deed, and to place that discretion

in the hands of the Board of Trade. I do not think that WRIGHT J. would be a right construction. I think it is a question very fairly and properly raised; but I think the Board of Trade are not entitled under this scheme to displace the discretion of the liquidators.

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The application must be dismissed with costs.

Solicitor for applicants: *Solicitor to the Board of Trade.*

Solicitors for liquidators: *Johnson, Weatherall & Sturt, for Wade, Bilbrough, Booth & Co., Bradford.*

F. E.

*In re* DRIFFIELD GAS LIGHT COMPANY.

WRIGHT J.

[00364 of 1897.]

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Feb. 16;
March 2.
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Company—Winding-up—Surplus Assets of Unlimited Company—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 109, 133.

Sects. 109 and 133 of the Companies Act, 1862, do not supply a rule for the mode of adjusting loss of capital or of distributing surplus assets, but only supply the necessary powers for giving effect to the rights and interests of the parties. In ascertaining those rights in the case of companies constituted under the Companies Acts, in the absence of any provision in the memorandum or articles of association, the capital account must first be equalized, and the balance must be appropriated according to the nominal amount of the shares, and a clause in the memorandum or articles regulating the distribution of dividends will not of itself govern the distribution of surplus.

In the case of companies not constituted under the Acts effect must be given to any clause, in the deed under which the company was constituted, with regard to surplus assets, but a provision as to distribution of dividends does not of itself govern the distribution of surplus.

Somes v. Currie, (1855) 1 K. & J. 605, and *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.*, (1887) 36 W. R. 1, distinguished and commented on.

By the deed of settlement under which a company was originally constituted losses were to be made good by the shareholders "in proportion to their respective shares," profits were to be divided amongst them "according to the amount of their respective shares," and upon a winding-up the residue, after paying debts, was to be "divided between the several proprietors"—namely, shareholders—"for the time being in proportion to their respective shares." The shares were of 10*l.* each. Some were fully paid, others were only paid up to the extent of 6*l.* 10*s.* per share, and some of both classes had been issued at a premium. The company was afterwards registered under Part VII. of the Companies Act, 1862, as an

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unlimited company. It sold its undertaking and went into voluntary liquidation, and after payment of its debts and the costs of liquidation had a surplus more than sufficient to return all the paid-up capital:—

Held, that the surplus must first be applied in returning the paid-up capital, and that the balance must be distributed amongst all the shareholders in proportion to the nominal amounts of their shares, and without regard to the premiums paid by any shareholders, or the manner in which dividends were payable or had in fact been paid.

THE facts of the case, as stated in the judgment of Wright J., were as follows: The Driffield Gas Light Company was constituted in 1835 under a deed of settlement and was registered under some or one of the old Joint Stock Companies Acts, and also under Part VII. of the Companies Act, 1862, as a company without limitation of liability. The deed of settlement provided (clause 1) “that the sums set opposite to the names of the parties hereto shall form the capital or joint stock of the company and that the aggregate amount thereof shall be 1800*l*.” (with a provision for increase by issue of further shares); (clause 19) that losses should be made good by the proprietors “in proportion to their respective shares”; (clause 20) that profits should be divided amongst the proprietors “according to the amount of their respective shares”; and (clause 32) that upon a winding-up the residue, after payment of debts, should be “divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking.” The capital was divided into shares of 10*l*. each. Before the date of the winding-up the original capital had been increased, by the issue of new shares, to 1200 shares of 10*l*. each. Six hundred of them (including the original shares) were issued before 1893, and were fully paid up at or soon after the times of issue. The other 600 were created in 1893, with only 6*l*. 10*s*. paid up. The deeds creating some of the issues of shares subsequent to the original issue recited resolutions of the company authorizing their creation on the terms that the holders of the new shares should be entitled to dividends on the amount from time to time called up thereon; but the deeds themselves provided that the new shares were to be in all respects subject to the provisions of the original deed.

The company had, to use the words of Wright J., “in fact,

probably wrongly, since the new shares were created in 1893 WRIGHT J.
 paid dividends on them in proportion only to the amount paid
 up on them." The undertaking of the company was sold in 1898
 1897 to a local authority, and the company was being wound up DRIFFIELD
 under a resolution of the shareholders. All the debts and GAS LIGHT
 costs of liquidation had been paid, and there remained a large COMPANY,
 surplus for distribution, the question being on what principle it In re.
 should be distributed as between the holders of the fully paid
 shares and the holders of partly paid shares.

O. L. Clare, for shareholders who had paid up their shares in full, but had not paid the company any premium. It will not be seriously argued that shareholders who have paid a premium stand on a better footing than those who have not paid premiums. The question is really between the holders of the fully paid shares and the holders of the partly paid shares. The paid-up capital has been or will be returned to the shareholders of both classes. The residue ought to be distributed in proportion to the capital paid up at the commencement of the winding-up. The liability of the shareholders is unlimited, and the surplus must be divided as if the company were a partnership. In *Birch v. Cropper* (1) the liability was limited, but the principles there laid down do not apply where the liability is unlimited. In that case the distribution of surplus assets is like that in case of a partnership—that is, according to the manner in which profits were distributable. This principle was adopted in *Somes v. Currie* (2), a case of a chartered company not under the Act of 1862, and in *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.* (3)

Brinton, for fully paid shareholders who had paid premiums, referred to *Bouch v. Sproule*. (4)

Hurrell, for partly paid shareholders who had not paid premiums, and *Dunham*, for partly paid shareholders who had paid premiums. After the return of the paid-up capital, the balance ought to be distributed amongst all the shareholders in proportion to the nominal amounts of their shares. The case is really governed by *Birch v. Cropper*. (1)

(1) (1889) 14 App. Cas. 525.

(3) 36 W. R. I.

(2) 1 K. & J. 605.

(4) (1887) 12 App. Cas. 385.

WRIGHT J. [They also referred to *Oakbank Oil Co. v. Crum* (1), and s. 133 of the Companies Act, 1862.]

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Cur. adv. vult.

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March 2. WRIGHT J. delivered judgment, in which, after stating the facts and the question to be decided, he proceeded as follows:—In the case of *In re Anglesea Colliery Co.* (2) it was held that apart from the Companies Acts it is the clear right of a partner, when the partnership is wound up and the debts are paid, to have contribution in order to repay to him capital which he has advanced in excess of his proportion, and that the Companies Acts must be construed in accordance with this principle, so that a holder of fully paid shares is to be regarded as a “contributory” entitled to have a call made on partly paid shares in order to equalize the capital account. In *In re Scinde, Punjab and Delhi Corporation* (3) and *Ex parte Maude* (4), it was established that in a winding-up under the Companies Acts where after payment of debts and costs a balance remains, but insufficient for a complete return of capital paid up, the capital account must be equalized by a call on the partly paid shares, and the assets must then, in the absence of any different provision, be distributed according to the nominal amount of the shares; and it was held that an express provision for the payment of dividends according to the amounts paid up on the shares did not prevent this rule from being applicable in the partial return of capital in a winding-up. It was also decided that the holder of the fully paid shares is not in the position of a shareholder who has paid calls in advance unless he has paid up on shares which have not been issued as fully paid, or fully called up. In *Oakbank Oil Co. v. Crum* (1), where the company’s articles of association provided that the shareholders should be entitled to dividend “in proportion to their shares,” it was held that it was not competent to the company to declare a dividend in proportion to the amounts paid up on different classes of shares, and the practice of five years was disregarded. Lastly, in *Birch v. Cropper* (5), after payment of

(1) (1882) 8 App. Cas. 65.

(3) (1867) L. R. 6 Ch. 53, n.

(2) (1866) L. R. 2 Eq. 379; 1 Ch.

(4) (1870) L. R. 6 Ch. 51.

debts and costs of winding-up, there was a balance more than sufficient to return all the capital paid up. The articles of association provided for payment of dividends in proportion to amounts paid up, but made no provision for distribution of surplus in a winding-up. The Court of Appeal held that the surplus should be distributed on the same principle as the dividends; but it was decided by the House of Lords that the article which governed dividends did not govern the distribution of the surplus, and that after equalization of the capital account the assets must be distributed according to the nominal amount of the shares.

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The effect of these decisions seems to be as follows: The winding-up sections (s. 109 and s. 133) of the Companies Act, 1862, do not of themselves supply any rule for the mode of adjusting loss of capital or of distributing surplus, but only supply the necessary powers for giving effect to the rights and interests of the parties. Those rights in the case of a company constituted under the Companies Acts must, in the absence of any provision in the memorandum or articles of association, be ascertained, in the view of one of the noble and learned Lords who took part in the decision of *Birch v. Cropper* (1), by recourse to general principles of equity; in the view of another of them, by reference to the principles and provisions of the Companies Acts. But in either view the result is the same, namely, that the capital account must first be equalized, and then there remains no ground for appropriating the balance in any other way than according to the nominal amount of the shares in the capital; and a provision in the memorandum or articles of association regulating the distribution of dividends will not of itself govern the distribution of surplus in a winding-up. In the case of a company not constituted under the Companies Acts it would seem to follow that reference must be made to the deed or instrument under which it is constituted, and if that deed or instrument contains any provision with regard to surplus effect must be given to it, but a provision regulating the distribution of dividends ought not to be considered as of itself governing the distribution of surplus. If

(1) 14 App. Cas. 525.

WRIGHT J. the capital of the company is limited by shares of equal or commensurable amount the same consequence ought to follow as if it were so limited under the Companies Acts, the holder of each share becoming, in the words of Lord Macnaghten in *Birch v. Cropper* (1), "entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital." In opposition to this conclusion, reliance is placed on two decisions, which happen to be the only reported decisions with reference to the distribution of surplus in the case of companies not constituted under the Companies Acts. The first is *Somes v. Currie*. (2) There the charter of the company provided that "every person holding any share in the capital stock in the said company . . . shall be entitled to the profits and advantages attending the said capital stock in proportion to the number of shares so held by him." Yet it was held by Page Wood V.-C. that upon the dissolution of the company the surplus must be distributed in proportion to the amounts paid up on the different classes of shares, and this without any previous equalization of the capital account. The ground of the decision seems to have been that on the particular facts of the case, and especially the fact that dividends had during three years been distributed according to the amounts paid up, the Vice-Chancellor held that there had in effect been a contract between the shareholders that "the profits and advantages" should be so distributed. It is pointed out by the Court of Appeal in *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.* (3) that *Somes v. Currie* (2) cannot be considered as suggesting any general rule, and a disapproval of it, if so considered, is plainly implied. The other case is the one just mentioned of *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.* (3). There it was held, both in the Court of Appeal and in the House of Lords, that the surplus was divisible according to the amounts paid up on the different classes of shares; but that decision, again, was expressly based on its own peculiar

(1) 14 App. Cas. 543.

(2) 1 K. &amp; J. 605; 1 Jur. (N.S.) 954.

(3) 36 W.R. 1.

circumstances, and it is explained in *Birch v. Cropper* (1) as depending entirely on very special facts, and not laying down any general principle, and not being an authority except where the circumstances are precisely similar. The very fact that *Somes v. Currie* (2) and *Sheppard v. Scinde, Punjaub and Delhi Ry. Co.* (3) have been so plainly treated as defensible only on special grounds shews that the general rule is not in accordance with them. I think, therefore, that in the present case effect must be given to the express provision of the deed of settlement in clause 32, and that after equalization of the capital account by a return of all capital paid up the surplus remaining must, according to the language of that paragraph, be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking"—that is, in proportion to the nominal amounts of the shares. There was a contention that persons who took shares from the company at a premium should be allowed to share in the surplus in proportion to what they paid for the shares. This is so plainly untenable that I think the liquidator should have costs as against the parties, if any, who separately supported that view. All other costs must come out of the general assets.

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Solicitors: *Oldman, Clabburn & Co., for Foster, Tonge & Botterill, Great Driffield; Chester & Co., for A. Pickering, Hull.*

The name of Mr. *George Russell Northcote*, who appeared for the liquidator, was accidentally omitted in the body of the report.

(1) 14 App. Cas. 525, 528, 531, 541, (2) 1 K. & J. 605; 1 Jur. (N.S.) 542, 954.

(3) 36 W. R. 1.

F. E.

C. A.

In re DEIGHTON AND HARRIS'S CONTRACT.

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[1897 D. 993.]

March 4.

Vendor and Purchaser—Conditions of Sale—Annuling Sale, Vendor's Power of—Title—Conveyance—Requisitions—Outstanding Estate, Getting in—Contract—Rescission—Defective Title—No Title.

A condition of sale empowering the vendor to annul the sale if the purchaser makes any objection or requisition "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which the vendor is unable or unwilling to comply with, extends to a matter of conveyance as well as of title.

Thus, where a vendor-mortgagee of leaseholds who, having contracted to sell the entire term, turned out, on the investigation of the title by the purchaser, to hold by a sub-demise the bare legal estate in which was outstanding, and expressed himself as unable or unwilling to comply with a requisition by the purchaser that the person having the legal estate should join in the conveyance; it was *held* by the Court of Appeal that the vendor was entitled, under a condition in the above form, to annul the sale.

Decision of Kekewich J. reversed.

The ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none.

Bowman v. Hyland, (1878) 8 Ch. D. 588, explained.

APPEAL from Kekewich J.

On July 23, 1896, two leasehold houses were put up for sale by auction in two separate lots, lot 1 being No. 49, Brackenbury Road, Hammersmith. In the particulars of sale, that house was described as "held upon lease for a term of 99 years from December 25, 1864, at a ground-rent of 5*l.* per annum." On the back of the particulars was a statement that the sale was "By order of the mortgagee."

No. 6 of the conditions of sale provided as follows: "If any objection or requisition whatsoever shall be made by either purchaser as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale, which the vendor is unable or unwilling to comply with, the vendor (notwithstanding any treaty, discussion, or litigation in reference thereto, or any attempt to remove or comply with the same) shall have full power to annul the sale upon returning to such purchaser the amount of his deposit in full satisfaction of all

his claims, and without payment of interest, costs, or compensation, and such purchaser shall thereupon return to the vendor the abstract of title and other papers which may have been delivered to him or his solicitor by the vendor; but such purchaser may, within seven days from the time of the vendor giving notice of annulment, elect to waive the objection or requisition, and take the property subject thereto."

Then condition 8 provided that the vendor, "being a mortgagee selling under his power of sale," should not be required to enter into any covenant except the implied statutory covenant that he has not incumbered, and that the concurrence of the mortgagor should not be required.

At the sale lot 1 was purchased for 230*l.*, the purchaser paying his deposit and signing the contract, the date fixed for completion by the conditions being August 11, 1896.

The vendor having delivered his abstract, the purchaser, on August 1, 1896, sent in his requisitions making various objections to the title, the abstract purporting to shew that the vendor, instead of being able to sell the whole term of ninety-nine years as stipulated for by the contract, really claimed, by various devolutions of title, under a mortgage by sub-demise only; that the legal estate in that sub-demise was outstanding in another sub-mortgagee, said to have been paid off, and that certain days of the original term of ninety-nine years were also outstanding.

On August 18 the vendor's solicitors sent their replies, on which the purchaser's solicitor made further requisitions. On September 16, 1896, the vendor's solicitors sent their answers, and asked for the draft assignment for approval.

On September 28 the purchaser's solicitor delivered further requisitions. On the 29th the vendor's solicitors sent replies, stating that they did so out of courtesy and without prejudice as the purchaser was out of time: and they again pressed for the draft assignment. In reply, on October 3, the purchaser's solicitor asked for a further abstract, saying that there were defects in title, and that he must have "a perfect abstract," one of the alleged defects being that the bare legal estate in the sub-demise under which the vendor claimed had been

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outstanding in one Baker, now a bankrupt, and was, therefore, vested in the official receiver in his bankruptcy. The purchaser's solicitor accordingly required that the concurrence of the official receiver in the conveyance should be obtained.

The vendor's solicitors replied that the official receiver was not a necessary party, and that in any case his concurrence would be difficult to obtain; and they again pressed for the draft assignment. The purchaser's solicitor then wrote insisting that the legal estate was vested in the official receiver, and that he should, therefore, be a party. Further correspondence passed, in the course of which the purchaser's solicitor stated that unless his requirements were complied with he should take proceedings to enforce the contract. Ultimately, on March 13, 1897, the purchaser's solicitor sent the draft assignment to the vendor's solicitors for approval, "subject to outstanding requisitions."

To this draft assignment there were, in addition to the vendor, seven separate persons named as parties for the purpose of conveying various estates or interests which appeared to be outstanding, one of these parties being the official receiver in Baker's bankruptcy in respect of the legal estate in the vendor's sub-mortgage.

On April 6 the vendor's solicitors returned the draft to the purchaser's solicitor with a letter stating that the official receiver refused to be a party without an order of the Court, and again urging that his concurrence was not material, but offering, if the purchaser would dispense with certain other parties, to apply to the Court for an order directing the official receiver to execute the assignment. On April 23, the vendor's solicitors having received no reply to that letter, wrote to the purchaser's solicitor giving him formal notice that under the 6th condition the vendor thereby annulled the sale.

Thereupon the purchaser, on May 26, 1897, issued a summons under the Vendor and Purchaser Act, 1874, claiming a declaration that the vendor was not entitled to rescind, and had no title to the property; return of the deposit, with interest; and payment of the purchaser's costs of investigating the title, of the preparation of the conveyance, and of the summons.

Upon the hearing of the summons on December 4, 1897, Kekewich J. held, upon the authority of *Bowman v. Hyland* (1), that the vendor was not entitled to rescind; also that he had not shewn a title; and his Lordship made an order for the return of the deposit and payment of the purchaser's costs of investigating the title and of the summons, as in *In re Hargreaves and Thompson's Contract*. (2)

The vendor appealed.

The appeal was heard on March 4, 1898.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the vendor. The learned judge below based his decision on *Bowman v. Hyland* (1), but that case has really no application to the present, for there the vendor had no title at all, whereas here the only question is as to the conveyance of an outstanding day of the term. This is just one of those cases which such a condition as we have here was intended to provide against, and we rely on the plain meaning of the condition.

Warrington, Q.C., and *R. B. Yardley*, for the purchaser. We submit that this case falls within the meaning of the decision in *Bowman v. Hyland*. (1) Here the vendor contracted to sell property "held upon lease for a term of ninety-nine years." This, it turns out, he is unable to do without the concurrence of other persons, who have not entered into any contract. Therefore he has not himself made any title, for he has not got the lease he purports to sell. To comply with the conditions he is bound to give us a legal title by the exercise of his power of sale, for he expressly states that he is selling "as mortgagee," whereas he cannot convey without the concurrence of other people altogether.

[LINDLEY M.R. You cannot say that the vendor here was in the same position as the vendors in *Bowman v. Hyland*. (1) Here the vendor had some title, but there has been a series of blunders affecting the title—the very things this condition was intended to meet.]

But we rely on this, that the vendor is quite unable, without the concurrence of others, to make a complete title. He may

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(1) 8 Ch. D. 588.

(2) (1886) 32 Ch. D. 454.

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have a colourable title, but that is not the title he has contracted to give us. So in *Bowman v. Hyland* (1) the vendor had some title, for he had a possessory title at the date fixed for completion.

Again, the vendor is not entitled to insist on this condition, for, by offering to convey after he was aware of the purchaser's objection, he waived his right to rescind: *Gardom v. Lee*. (2)

[LINDLEY M.R. The condition there was different from this.]

But it is substantially the same. Conditions of sale must be construed strictly against the persons making them: *Greaves v. Wilson*. (3) There the word "conveyance" appeared in the condition, and yet it was held that the vendor was bound, notwithstanding that condition, to get in an outstanding estate and was not entitled to rescind. Getting in an outstanding estate is a mere matter of conveyance, not of title, and it is only on a question of title that a vendor is entitled to rely on a condition for rescission, for it is part of his duty to get in an outstanding estate: this he can do, and therefore he cannot say that he is "unable" to do so within the meaning of the condition: *Kitchen v. Palmer* (4); *In re Jackson and Oakshott*. (5) In fact, the word "conveyance" is not usually found in such a condition, the object of which is to protect the vendor against insuperable objections to "title" only: *Hardman v. Child*. (6) It is hard upon the purchaser that he should be put to useless expense, which he cannot recover, through the failure of the vendor to make a title according to his contract. Upon the whole, we submit the learned judge below was right.

LINDLEY M.R. This case seems to me, when once understood, to be free from all serious difficulty. It is a case of vendor and purchaser, and it is one in which the vendor is not in the position of a man who agrees to sell property to which he has no title at all. It is not like the case of *Bowman v. Hyland* (1), where a man having got only the last remaining

(1) 8 Ch. D. 588.

(2) (1865) 3 H. & C. 651.

(3) (1858) 25 Beav. 290.

(4) (1877) 46 L. J. (Ch.) 611.

(5) (1880) 14 Ch. D. 851.

(6) (1885) 28 Ch. D. 712, 715.

month of a term in certain land purported to sell the property in fee simple, and before the conveyance was executed it was found out that some one else was in possession. Hall V.-C said that a vendor could not avail himself of such a condition where he had no title at all. He also held, in the second part of his judgment, that the vendors had waived their right of rescission because the matter went on long after they knew the real position of the case with reference to the title. In fact, such a condition is only applicable to an honest case. Now, I treat this as an honest case. Titles are often complicated, and the vendor may know that there are difficulties giving rise to objections which may possibly be insisted on by a purchaser. The present vendor apparently knew that there were some such difficulties in this case, so he has made this condition: [His Lordship then read the sixth condition, and proceeded:—] It appears that when the title was investigated it was not in a satisfactory state. There had been certain dealings with the property which made it very difficult for the vendor to make such a title as he would have been bound to make if there had been no such condition as the sixth. Amongst other things, there was a difficulty with regard to getting in an outstanding interest in the official receiver in bankruptcy of the estate of one Baker. The purchaser said it was quite plain that it was necessary to get the concurrence of the official receiver because there was some interest outstanding in him. The vendor objected to that, and said it was a mere conveyancing question: that it would be troublesome for him to get that concurrence, that it was not really material, and that, if insisted on, he could not get it. The purchaser still insisted; and the vendor says, "Very well, I rescind the contract." Why is he not entitled to rescind under the very wide condition I have read? It is true that the condition does not in terms refer to an objection as to "conveyance," but any such objection as that is got rid of by the words "or any other matter or thing relating or incidental to the sale." The conveyance is perhaps one of the most important of the incidents of the sale. That is the vendor's case; and it seems to me that he is only exercising the right given to him by the sixth condition when fairly read and fairly applied. That is unfortunate for the purchaser, but

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I do not say that it is hard, because the condition gave him notice that the right might be exercised; though no doubt he has been put to expense which I am afraid he cannot get back.

Then the only other point is whether the right to rescind could be exercised having regard to what passed between the parties. [His Lordship then referred to the correspondence, and continued:—]

Now, the case is not like *Gardom v. Lee* (1), to which Mr. Warrington referred, where it was held that a vendor, having elected to insist upon specific performance of the contract, could not rescind. Here the parties went on negotiating after the objection was made, and there was nothing sufficient to preclude the vendor from insisting on his right to rescind if the purchaser insisted on his objection. The purchaser is insisting on his objection, and the vendor is justified in acting on his right. I am therefore of opinion that the appeal should be allowed, with costs both here and below. We make no declaration as to title: it is sufficient to say that the vendor was entitled to rescind.

RIGBY L.J. I am of the same opinion; but as we are differing from the learned judge below, I will give my reasons shortly. He based his judgment upon *Bowman v. Hyland* (2); but that was a different case. There the vendor said he would sell the property in fee simple; but all that he had at the date of the contract was the residue of a long term of years, and long before the purchase could be completed the term had run out; so that, of course, he had nothing to convey, and the question was whether he could ride off upon a condition to rescind which was obviously not framed with reference to any such case as that which arose there. I will assume that that case was well decided; but it has no application to the present case. I concur with all the Master of the Rolls has said.

VAUGHAN WILLIAMS L.J. I agree. I have nothing to add.

Solicitors for appellant: *Godfrey & Robertson.*

Solicitor for respondent: *F. Shirley Turner.*

(1) 3 H. & C. 651.

(2) 8 Ch. D. 588.

SOUTH HETTON COAL COMPANY v. HASWELL,
SHOTTON, AND EASINGTON COAL AND COKE
COMPANY.

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March 9.

[1897 S. 3705.]

Contract for Sale—Tender—"Highest net Money Tender"—Practice—Striking out Statement of Claim—Order XXV., r. 4.

The owner of certain coal mines proposed to receive sealed tenders from two parties who were competing for the purchase of them, and undertook to accept the highest net money tender. One of the competitors offered such a sum as would exceed by 200*l.* the amount offered by the other:—

Held, that a tender in this form did not answer the description of the highest net money tender, and an order was made striking out the statement of claim in an action for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action.

THIS was an appeal from an order of North J. striking out the statement of claim in the action as shewing no reasonable cause of action, and dismissing the action. The action was brought for specific performance of an alleged contract for the sale to the plaintiff company of certain coal measures belonging to the defendant company, and there was also a claim for damages.

It appeared from the statement of claim that the defendant company were the lessees of certain coal measures known as the Easington and Undersea Royalties. They were also lessees of certain coal measures known as the Pespool Royalty, and were under considerable liability in respect of rent to the lessor thereof. The defendant company were in voluntary liquidation, and the defendant Richard Henry Holmes was the liquidator thereof.

For some considerable time prior to the transactions which gave rise to this action negotiations were on foot between the liquidator and the plaintiff company for the purchase by the latter of the defendant company's interest in the Easington and Undersea Royalties, and similar negotiations were on foot between the liquidator and the defendant John Storey Barwick, and ultimately the liquidator asked for sealed tenders to be sent

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in to him on or before September 23, 1897. On September 20, 1897, the liquidator sent to Messrs. Dees & Thompson, the plaintiff company's solicitors, a letter to the following effect:—

“Re the Haswell Colliery Company, Limited.

“In liquidation.

“Having received from Mr. Barwick the inclosed letter of specific inquiry as to the course I propose to adopt as to tenders sent in for the Easington and Undersea coal at our meeting on Thursday afternoon next, and which I am prepared to receive on or before Thursday morning, I think it only proper and fair that I give you a sight of Mr. Barwick's letter and inquiry, and a copy of my this morning's reply thereto.”

The letter from Mr. Barwick asked the liquidator for information as to the mode he intended to adopt in dealing with the sealed tenders, and whether he was prepared to accept the highest tender then submitted to him.

The reply of the liquidator gave particulars as to his intended course of action with regard to the tenders, and concluded as follows: “And the highest net money tender I receive (all other things being equal and satisfactory), that tender I will at once accept.”

The liquidator subsequently arranged that the tenders should be handed in at the defendant company's office on October 7, 1897, and opened there in the presence of all parties. Accordingly at a meeting held on that date sealed tenders on behalf of the plaintiff company and of the defendant Barwick were handed in, and by agreement the tender of the latter was first opened and read. That tender was as follows: “I hereby offer you the sum of 31,100*l.* for the company's interest in the Easington and Undersea Royalties, and in addition I agree to indemnify you and the company against all claims and liabilities under the Pespool lease, taking an assignment of same as from May, 1896, and repaying the 1000*l.* already paid by the Messrs. Lamb.”

Afterwards the tender of the plaintiff company, which was signed and sent on their behalf by Messrs. Dees & Thompson, was opened and read, and was as follows: “Easington and Undersea Royalties. Referring to previous negotiations, we,

on behalf of the South Hetton Company, offer for these royalties such a sum as will exceed by 200*l.* the amount to-day offered for them by the other proposing purchaser, coupled with a transfer of the Pespool lease if the other offer be upon that footing."

The statement of claim then alleged that notwithstanding that the said tender on behalf of the plaintiff company was "the highest net money tender," the liquidator declined to recognise it, and wrongfully accepted the tender of the defendant Barwick. And it concluded by submitting that there was a valid contract between the liquidator and the plaintiff company which they were entitled to have specifically performed.

The defendants moved under Order xxv., r. 4, for an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action. North J. held that, assuming the plaintiffs' tender to be the highest net money tender, all other things were not equal and satisfactory, because upon the true construction of the plaintiffs' letter they had not agreed to take a transfer of the Pespool lease as from a past date, or to take over the past liabilities of the defendant company in respect thereof. He therefore came to the conclusion that the statement of claim disclosed no reasonable cause of action, and ordered it to be struck out and the action dismissed.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *O. L. Clare*, for the plaintiffs. We say, first, that the plaintiffs are right in substance; and secondly, that in any event the learned judge ought to have allowed the action to proceed to trial in the ordinary course.

The liquidator having bound himself to accept the highest net money tender, all other things being equal and satisfactory, a contract arose as soon as a tender fulfilling those conditions was sent in.

The plaintiffs' offer, having regard to Mr. Barwick's offer of 31,100*l.*, is in effect a definite offer of 31,300*l.*, and the liquidator could have sued them upon it. It is just as certain as if it had been based upon a previous offer of their own. It is based upon an offer which in fact existed, and which by arrangement between the parties was communicated to the

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liquidator before the plaintiffs' offer, and an offer which is capable of being defined by reference to an existing document is a definite offer: *Shardlow v. Cotterell*. (1) Then putting aside the other condition, was it an offer which the liquidator was bound to accept? We say that this was the highest bid, and that it is immaterial to the liquidator that the offer was made in such a form as to give the plaintiffs an advantage over their competitor. It is the highest net money tender. If this is a tender which the liquidator could have insisted on, it is equally a tender to which the plaintiffs can hold him.

[They also contended that the plaintiffs' offer so far as it related to the transfer of the Pespool lease was the equivalent of the defendant Barwick's offer, and that there was no ground for saying that all other things were not equal and satisfactory within the meaning of the liquidator's letter.]

*Cozens-Hardy, Q.C., Vernon Smith, Q.C., and Micklem*, for the defendant company, and *Younger* for the defendant Barwick, were not called upon.

LINDLEY M.R. Looking at this case as an action for specific performance, it strikes me as a little grotesque; but looking at it as an action for damages, it appears to me that there is nothing in that. The plaintiffs claim specific performance, and, if they cannot get it, damages. I think that there are two very short answers to their case. I lay aside all questions under the Statute of Frauds. I assume that the letter written by Mr. Holmes to Mr. Barwick is to be treated as a letter addressed to the plaintiffs themselves, and I will deal with the case on that footing. [His Lordship then referred to the correspondence set out in the statement of claim, and continued as follows:—] I have not the slightest doubt that if the liquidator had thought fit to accept the plaintiffs' offer it would have been open to him to do so, and the plaintiffs would have been bound by that acceptance. I say nothing as to the right of Mr. Barwick to object, but, as between the liquidator and the plaintiffs, I do not doubt that the liquidator might have accepted that offer.

But now we have to consider whether he was bound to

accept it. That raises two questions. Does the offer fairly answer the description of what the liquidator had bound himself to accept—in other words, does it answer the description of being “the highest net money tender I receive”? It appears to me obviously not. Whether it was a tender at all depended entirely, not upon the construction of the letter, but upon whether other people tendered. That is not what the liquidator wanted, and that is not what he bound himself to accept. He says, “Send me your highest net money tender, and I will consider it.” This is merely illusory. It does not answer the description in a business sense, and it does not answer the description in a legal sense. I do not think that the liquidator was under the slightest obligation to accept this, although he might have accepted it. That is not the ground to which North J. attached most importance, but to my mind it is decisive. I think that we should be encouraging trickery and making a very bad precedent if we held that this was, in any fair sense of the word, the highest net money tender which the liquidator had bound himself to accept. I do not accuse these gentlemen of trickery; but if we said that this letter answered the description of the highest net money tender, we should open the door to gross fraud, not only on purchasers, but on vendors also.

[His Lordship then discussed the question as to the terms upon which the plaintiffs had agreed to take the transfer of the Pespool lease, and held that the plaintiffs’ letter was ambiguous upon that point, and that the liquidator was justified in saying that the condition as to all other things being equal and satisfactory had not been fulfilled, and he concluded as follows:—]

I think that both points are absolutely fatal, and that there is no contract at all, and that North J. was perfectly right in dismissing the action.

RIGBY and VAUGHAN WILLIAMS L.JJ. concurred.

Solicitors : *Crossman, Prichard, Crossman & Block, for Dees & Thompson, Newcastle-upon-Tyne ; Botterell & Roche ; E. Flux & Leadbitter, for Ryott & Swan, Newcastle-upon-Tyne.*

H. B. H.

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## PAGET v. PAGET.

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[1896 P. 810.]

Feb. 22, 25, 28;  
March 24.

*Married Woman—Separate Estate—Restraint on Anticipation—Payment of Husband's Debts—Exoneration—Indemnity against Husband—Order removing Restraint—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.*

A wife entitled under a settlement to a life interest in property subject to a restraint from anticipation obtained from the Court, for the purpose of raising money to pay off her husband's debts, two orders under s. 39 of the Conveyancing and Law of Property Act, 1881, charging her life interest with the sums of 23,000*l.* and 22,000*l.* She afterwards brought an action against her husband for a declaration that he was liable to indemnify her against the two charges created on her separate property for the payment of his debts, and the action was dismissed by Kekewich J. (see ante, p. 47).

Upon appeal, it was *held* that, under the circumstances of the case, no inference could be drawn in favour of the wife of any right to be indemnified by her husband, and the appeal was dismissed.

The doctrine that if a wife charges her separate property to pay her husband's debt she is *prima facie* regarded as lending, and not giving him the money raised, and as entitled to have the property exonerated by him, is purely equitable. It is based upon an inference to be drawn from the circumstances of each case, and there may be circumstances which prevent it from arising; so that until an inference in favour of the wife arises, there is no presumption for the husband to rebut.

In cases where orders have been made under s. 39 of the Act of 1881, it is the order of the Court which binds the estate of the wife, and not what she does when the restraint on anticipation is removed; and although it might be convenient for the order to indicate the husband's liability to indemnify the wife in cases where it is intended he should be liable to do so, the silence of the order in this respect does not negative the existence of the wife's right to indemnity where it can be inferred from the circumstances.

THIS was an appeal by the plaintiff, Mrs. Paget, from the decision of Kekewich J. (1), where the facts of the case and the arguments on either side are fully reported.

*Renshaw, Q.C.*, and *A. àBeckett Terrell*, for the appellant.

*Cozens-Hardy, Q.C.*, and *John Henderson*, for the respondent, Mr. Paget.

*Renshaw, Q.C.*, in reply.

(1) Ante, p. 47.

During the arguments before the Court of Appeal, which were in substance similar to those already reported, the following additional authorities were referred to—By counsel for the appellant: *Bagot v. Oughton* (1); *Ferguson v. Gibson* (2); *Caton v. Rideout* (3); *In re Pollard's Settlement* (4); *Lewis v. Nangle* (5); and by counsel for the respondent: *Gray v. Dowman*. (6)

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March 24. The judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.) was delivered by LINDLEY M.R. as follows:—This is an appeal by the plaintiff, Mrs. Paget, against a judgment of Kekewich J. dismissing an action brought by her against the defendant, her husband. The object of the action was to obtain a declaration that the plaintiff's husband was liable to indemnify her against two charges for 23,000*l.* and 22,000*l.* created by her on her separate property for the payment of his debts. The case is reported in [1898] 1 Ch. 47. The material facts are there set out, and it is unnecessary to repeat them at length here. It is sufficient to state that Mr. and Mrs. Paget were married in January, 1877. The husband was entitled to some reversionary property. His interest in this property was settled on the marriage, but this property produced no income to him. The wife was a lady of fortune, and the bulk of her property was settled on her for her life for her separate use without power of anticipation. The sum of 2000*l.* a year derived from her property was, however, settled on her husband for life, but so that if he attempted to alienate it, or if he became bankrupt, this annuity became payable to his wife. The other provisions of the settlement need not be referred to.

The husband and wife moved in good society and, large as their income was, they lived far beyond it. So recklessly extravagant were they, that five years after their marriage 23,000*l.* was sorely needed to relieve them from the pressure of debts for which the husband was legally liable, but which debts

(1) (1717) 1 P. Wms. 347.

(2) (1872) L. R. 14 Eq. 379, 385.

(3) (1849) 1 Mac. &amp; G. 599.

(4) [1896] 1 Ch. 901; 2 Ch. 552.

(5) (1752) Amb. 150; S.C. note at p. 664 to *Evelyn v. Evelyn*, (1731)

2 P. Wms. 659.

(6) (1858) 27 L. J. (Ch.) 702.

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had been contracted to defray the expenses of the extravagant mode of living which they both apparently enjoyed. It is impossible, in our opinion, to read the evidence in the case without coming to the above conclusion. The affidavits filed in support of the plaintiff's application in June, 1882, for the order to which I will refer presently, leave no doubt in our minds that these debts had been contracted, not for purposes of the husband with which the wife had little to do, but in order to enable them both to live in the style they both thought suitable, and perhaps necessary, to enable them to maintain and enjoy that high social position which they both so greatly desired.

We attach more importance to what the wife said in these affidavits than we do to what she said some fifteen years later when examined in this action, and when she was endeavouring to support her present claim. In the affidavits sworn by her and her solicitor in 1882 there is nothing to lead to the inference that any of the debts which then had to be met were incurred by her husband for purposes of his own as distinguished from the purposes of himself and his wife as already stated. In her affidavit of June, 1882, the plaintiff referred to the debts as contracted by her husband and herself as "our debts." It is true she said that until 1880 her attention was not called to the fact that she and her husband were getting into difficulties; but her affidavit shews that, after she knew of those difficulties, all that she really cared about was to increase the net income of herself and her husband, and to maintain their position in society. Her solicitor's affidavit leads to the same conclusion.

On June 28, 1882, the plaintiff applied for and obtained an order under s. 39 of the Conveyancing Act, 1881, enabling her to mortgage her life interest to secure 23,000*l.* and interest and the premiums of a policy on her life. We do not think it necessary to refer in detail to the arrangements made for raising this sum, nor to its application when raised. It is sufficient to say that the money was raised as authorized by the order, and except as to 3600*l.*, was applied in paying the debts intended to be paid off by its means. The 3600*l.* not so applied was misappropriated by the solicitor who raised the money. Five



years afterwards another sum of 22,000*l.* was wanted for similar purposes. Another application was made to the Court, supported by further affidavits by the plaintiff and her then solicitor, and on August 11, 1887, another order was made enabling the plaintiff to mortgage her life interest for 22,000*l.* and interest and for the premiums on another policy. This sum was accordingly raised and applied as authorized by the order. The plaintiff's affidavit filed on this occasion, July 28, 1887, referred to what had been done in 1882 and to the misappropriation of 3600*l.*, and to the fact that debts had been contracted to pay off the creditors who ought to have been paid off with that sum, and to the impossibility of avoiding bankruptcy and loss of social position if the arrangements then contemplated were not carried out. The plaintiff stated her desire to raise this sum of 22,000*l.*, and she spoke of the debts as "our debts" as she had done in 1882. She represented the debts to be hers quite as much as her husband's, and she treated his income and hers as one which it was desirable to maintain as far as possible.

These transactions of 1882 and 1887 having been completed, the question arises whether Mrs. Paget is entitled to be indemnified by her husband against these sums of 23,000*l.* and 22,000*l.* when called in, and in the meantime against the interest and premiums charged on her life interest by the above orders. The fact that the plaintiff and her husband were separated in 1893 explains how this controversy has arisen, but does not, in our opinion, affect the question of law which has to be considered.

The plaintiff's rights, whatever they are, were not created in 1893, but arose in 1882 and 1887, although she might not care to enforce them whilst she and her husband lived happily together. What, then, were her rights in 1882 and 1887? In this action she has given evidence, and has stated that nothing was ever said about her giving anything to her husband, that he managed all her affairs, and she did not understand them, and did not want to do so; that in making her former affidavit in 1882 she ought not to have used such expressions as "our debts" and "my debts"; that she herself was not living beyond her income; that some of the debts which had to be

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paid were not for money spent for her and her husband's joint benefit. But when pressed on this point it seems tolerably plain that there is no reason for saying that the statement contained in her affidavit of 1882 did not disclose the true state of things and ought not now to be believed, although she evidently wishes to minimise the effect of it. What she now says, however, is that all she knew was that her husband was in danger of being made bankrupt, and that she wished to save him from such a disaster. Her attempt to dissociate herself from her husband's racing debts was not successful. As regards the transaction of 1887, she admitted that the financial situation which needed treatment then was very much the same as in 1882 and arose from the same cause. She also stated that in 1887 her husband was in America, and that Chitty J., who made both orders, saw her in his private room and was told by her how these new difficulties had arisen, what the debts were, what the money was wanted for, and so on. The learned judge was, no doubt, greatly influenced on both occasions by her own statements as to her own indebtedness. Bearing in mind this evidence, we have to consider the effect in equity of the transactions in 1882 and 1887 to which I have alluded.

The authorities bearing on the subject, beginning with *Huntingdon v. Huntingdon* (1) and coming down to *Hudson v. Carmichael* (2), shew that if a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is *primâ facie* regarded in equity, and as between herself and him, as lending him and not giving him the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created. This doctrine is purely equitable, and the authorities which establish it shew that it is based on an inference to be drawn from the circumstances of each particular case; the *primâ facie* inference being in such a case as that supposed that both parties intended that the wife's assistance should be limited to the necessity of the case and should not go beyond such necessity. But even where the wife charges her property with money to pay her husband's debts

(1) (1702) 2 W. & T. 6th ed. 1147.

(2) (1854) Kay, 613, 620.

incurred without reference to her there may be circumstances which prevent any inference from arising in her favour. Thus, if a settlement is made by the husband on his wife at the time she charges her estate he is regarded as purchasing her assistance; and the inference that the parties intended that the wife's property should be exonerated by the husband does not arise (see *Lewis v. Nangle* (1)). *Clinton v. Hooper* (2) is the leading authority to shew that the doctrine in question is based on an inference to be drawn in each case from all the facts of that particular case. It was long ago settled that, although under the old law a husband became liable for the ante-nuptial debts of the wife, she had no right in equity to compel him to exonerate property of hers charged with those debts, even although he had expressly covenanted to pay them: see *Lewis v. Nangle* (1) and *Earl of Kinnoul v. Money*. (3) This shews the importance of ascertaining and not confounding the wife's debts with the husband's debts when considering such cases as those to which I am alluding. To say that in all such cases there is a presumption in favour of the wife, and that it is for the husband to rebut it, is, in our opinion, to go too far and to use language calculated to mislead. The circumstances of each case must all be weighed in order to see what inference ought to be drawn; and until an inference in favour of the wife arises there is no presumption for the husband to rebut. If this is forgotten, error may creep in. The circumstances here we take to be those disclosed by the plaintiff in her affidavits, especially her representations of her own indebtedness, as well as of her husband's; and I will add to these her recent statement that nothing was ever said about giving anything to her husband. Neither was anything said about lending him anything. She had a large income, and, although restrained from anticipation, she might have accrued income in respect of which she could contract debts. There is no reason to suppose that she had no debts and could contract none. She represented herself as pressed by her creditors, and we see no reason to doubt the truth of her statements. The plaintiff was as extravagant and

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(1) Amb. 150.

(2) (1791) 1 Ves. 173; 3 Bro. C. C. 201.

(3) (1767) 3 Swans. 202, n.

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reckless as her husband, and was quite as desirous as he of maintaining her position in society. This object, so dear to both of them, might have been entirely frustrated if she had the right against him which she now asserts. That right would, in point of law, have been her separate estate, and she might under pressure have assigned it, and her assignee might have enforced it against her husband whether she liked it or not. She had plenty of debts enforceable against any separate estate she had or might have, besides income which she could not anticipate.

Those circumstances, and the peculiar position of her husband with respect to his 2000*l.* a year, lead us to the conclusion that no inference ought in this case to be drawn in her favour of any right to be indemnified by her husband.

This conclusion is arrived at apart from the orders of the Court to which Kekewich J. attached so much importance, and the effect of which I will now consider. They are based on s. 39 of the Conveyancing Act, 1881. [His Lordship read that section, and continued :—]

Unless the wording of the section is attended to, there is danger of regarding the section as merely authorizing the Court to remove the restraint against alienation which is so frequently imposed on married women when property is settled on them for their separate use. But it is to be observed that what binds the estate of a married woman is not what she does when the restraint is removed, but the order made by the Court. The language of the section is that "the Court may . . . by judgment or order . . . bind her interest." The Court is empowered to do this where it appears to the Court for her benefit so to do, and with her consent.

A question at once arises whether the doctrine which is applicable to charges created by a wife to pay her husband's debts is to be applied to charges created not by her, but by an order of the Court. The learned judge in the Court below has held that the doctrine in question has no application to such a case, and that where orders are obtained under that section charging her property with money to be applied in paying her husband's debts, the order should shew on the face of it that

her husband is to be liable to indemnify her if he is to be under any such liability. It certainly might be convenient if such orders were so drawn as to shew what was intended in this respect. But these orders are usually made without hearing the husband, and we are not prepared to say, as a matter of law, that an order silent as to the wife's rights against her husband is fatal to the existence of such rights.

The circumstances under which the order was made might shew that a right on her part to be indemnified by her husband ought to be inferred although the order did not allude to it. The absence of all allusion to such right is, however, a circumstance to be considered, and in this particular case the form of the orders of 1882 and 1887 tells against the plaintiff when regard is had to the statements made by her in order to obtain them. It was urged that it could not be for her benefit that she should be deprived of her right to indemnity, but the force of this observation depends on the tacit assumption that she had the right.

The question comes back to the proper inference to be drawn from all the facts, including the orders themselves. And bearing in mind that the plaintiff's paramount object was to save her and her husband's joint income, and thus, as far as possible, to preserve her and his position in society, and that this object might have been defeated if she reserved a right to be indemnified by him, the proper inference to be drawn is, in our opinion, adverse to the existence of such right. In our opinion, therefore, the appeal fails, and must be dismissed with costs.

[On the application of the respondent's counsel, their Lordships made an order under s. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), that the cost of the appeal should be paid out of the property of the appellant subject to restraint on anticipation.]

Solicitors: *Leman & Co.*; *Dawes & Sons.*

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STIRLING J.

LEVY v. STOGDON.

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[1891 L. 2763.]

Jan. 27;  
Feb. 16;  
March 3.

*Vendor and Purchaser—Specific Performance—Delay—Lien for Deposit.*

In 1886 a vendor contracted in writing to sell free from incumbrances a contingent reversionary interest in personalty to a purchaser who paid a deposit on the purchase-money. The reversion proved to be incumbered, and the purchaser insisted on a conveyance free from incumbrances, but was told that the incumbrances would be paid off, which was never done. The vendor afterwards created further charges on the reversionary interest to persons who had notice of the contract, and was adjudicated a bankrupt in 1888. In the same year the bankruptcy was annulled, upon the acceptance of a composition by his creditors, and under the scheme of arrangement the whole of his property was sold by his trustee. In 1891 the purchaser became bankrupt, having previously assigned his interest under the contract to P. who subsequently assigned the same to B. No attempt having been made to enforce the contract, the reversion fell into possession in 1895, and B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser:—

*Held*, (1.) that the delay was a bar to any claim for specific performance; (2.) that the purchaser was a secured creditor of the vendor in respect of the deposit, and that the purchaser must under the circumstances be treated as having elected to rely on his security; and as no Statute of Limitations applied B. was entitled to enforce his lien.

THIS was a summons taken out on behalf of John Manley Birch, asking that the certificate of the master might be discharged or varied by finding that the said J. M. Birch was the person entitled to a certain capital sum of 20,000*l.* now or lately represented by the sum of 21,667*l.* 11*s.* 5*d.* Consols mentioned in an indenture dated September 29, 1888, in lieu of the finding that it was vested in the plaintiff Howard Rumney and his incumbrancers. The action was brought for the purpose of ascertaining the priorities of the various incumbrancers upon property formerly belonging to Sir John Sebright.

By an agreement dated April 15, 1886, Sir John Sebright agreed to sell, and Frederick Lovell Keays agreed to purchase, free from incumbrances, at the price of 3550*l.*, a sum of 21,667*l.* 11*s.* 5*d.* Consols (being the sum in question upon this summons) comprised in the vendor's marriage settlement, and

to which the vendor was entitled contingently upon there being no younger children of his marriage, but subject to the life interests of himself and his wife therein. The contract provided that the purchaser should pay the sum of 100*l.*, part of the purchase-money, upon the execution of the agreement, and should pay the residue on September 25, 1886, the day fixed for completion; and (clause 4) if from any cause whatever the purchase should not be completed on that day the purchaser was to pay interest at 5 per cent. on the balance of the purchase-money until completion. And it was further provided that the agreement should not be rendered void by the death of the survivor of the vendor and his wife before June 25 then next. Sir John Sebright had at that date incumbered all his property, including the reversion which formed the subject of the agreement, and he subsequently mortgaged the reversion to various incumbrancers, who were represented by the plaintiff, all of whom took with notice of the agreement for sale. On the execution of the agreement Mr. Keays paid the deposit of 100*l.* On August 11, 1886, the solicitors of Sir John Sebright delivered to Mr. Keays a partial abstract of title, which was afterwards supplemented by further abstracts on November 29, 1886, and July 22, 1887.

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In January, 1887, Mr. Keays sent in requisitions upon the title, and in particular a requisition as to the discharge of the incumbrances. To this requisition the solicitors of Sir J. Sebright sent the following answer: "The incumbrancers will be paid off, or they will join in the assignment to the purchaser"; and on April 25, 1887, they further stated, "The incumbrances shall be satisfied." Nothing was ever done, however, towards paying off the incumbrances, and Sir J. Sebright was in fact at that time impecunious and unable to discharge them out of his own moneys.

On July 7, 1887, a petition in bankruptcy was presented against him, upon which, on November 3, 1887, a receiving order was made. On January 26, 1888, he was adjudicated a bankrupt. The creditors subsequently agreed to accept a composition, and the bankruptcy was, on September 28, 1888, annulled. On the following day Sir J. Sebright and his trustee

STIRLING J. in bankruptcy, in pursuance of a scheme of arrangement, executed an assignment of all the debtor's property to one Baker as trustee for a person named Burr. Baker and Burr subsequently mortgaged the reversion to other persons.

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On June 3, 1890, Keays assigned all his interest under the contract to one Pryer.

On November 15, 1890, Sir J. Sebright died.

On November 20, 1890, Keays gave notice of the contract to the trustees of the settlement.

On May 31, 1891, Keays himself was adjudicated bankrupt, and the trustee in his bankruptcy sold all his property, including such interest, if any, as he had under the agreement of April 15, 1886, to J. M. Birch, the present applicant.

On May 22, 1895, Lady Sebright died; and on the 27th notice of the contract was given to the trustees on behalf of Birch.

On February 1, 1896, Pryer assigned to Birch all his interest under the contract.

On May 11, 1896, an order was made, upon the application of Birch, directing the following inquiry: "Who is the person entitled to the capital sum of 20,000*l.* now represented by a certain sum of 21,667*l.* 11*s.* 5*d.* Consols mentioned in the indenture dated September 29, 1888."

In answer to that inquiry the master found that Birch had lost by reason of delay all right to specific performance of the contract. The present summons was then taken out, upon which two questions arose: (1.) whether Birch was entitled to have the contract specifically performed; and (2.), if not, whether he was entitled to a lien upon the fund for the deposit of 100*l.* paid by the original purchaser, and interest.

After the bankruptcy of Sir J. Sebright nothing further was done in the matter except that on February 4, 1888, the solicitors of Sir J. Sebright wrote to Mr. Keays as follows: "Dear Sirs,—Sir J. Sebright and Consols Contract. Regarding the contract made in April, 1886, you will remember that we have repeatedly pressed for the matter to proceed in the usual way, and therefore there has been no delay on our part, but nothing has been done except the execution of the contract for

the sale of Sir John Sebright's reversion in Consols to you for STIRLING J. 3550*l.*, and as Sir John has now become bankrupt, it is quite out of his power to proceed further in the matter, and therefore the sale must either be considered as cancelled or it must be completed by Sir John's trustees in bankruptcy . . . to whom we beg to refer you."

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Mr. Keays wrote back: "Referring to your letter of the 4th inst., I would remind you that the title as adduced is defective. As soon as the title is completed I shall be prepared to carry out the contract, and I cannot consent to its being treated as cancelled. Indeed, so far from this, I now call upon you to complete the title and carry out the sale."

*Buckley, Q.C.*, and *Stewart-Smith*, for the summons. The authorities have never gone the length of saying that a purchaser who has always been anxious to complete, and has been put off by the vendor, is debarred from relief because he has not immediately brought an action for specific performance: see *Scholefield v. Templer*. (1) Under the circumstances of this case the purchaser has done all that he could reasonably be expected to do.

*Haldane, Q.C.*, *Grosvenor Woods, Q.C.*, and *Theodore Ribton*, for Rumney. The mere assertion of a claim unaccompanied by active prosecution of it in a court of law is not an answer to a plea of laches: *Clegg v. Edmondson*. (2) And it is especially necessary that the purchaser should prosecute his claim promptly where the subject-matter of the contract is of a speculative and fluctuating value like a reversion: *Mills v. Haywood* (3); *Milward v. Earl Thanet*. (4) After a lapse of ten years it is preposterous to claim specific performance. Even if the analogy of the Statute of Limitations alone applies the applicant is barred. The purchaser having lost his right to specific performance by reason of laches is not entitled to recover his deposit: *Shaw v. Foster* (5); *Ex parte Barrell* (6); *Howe v. Smith*. (7)

(1) (1859) 4 De G. & J. 429, 434.

(2) (1857) 8 D. M. & G. 787, 810.

(3) (1877) 6 Ch. D. 196, 202.

(4) (1801) 5 Ves. 720, n.

(5) (1872) L. R. 5 H. L. 321.

(6) (1875) L. R. 10 Ch. 512.

(7) (1884) 27 Ch. D. 89.

STIRLING J. [STIRLING J. referred to *Rose v. Watson*. (1)]

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It is pointed out in *Rose v. Watson* (1) that the position is different when specific performance is no longer possible: *Dinn v. Grant*. (2) Under the American law the Statute of Limitations is held to apply both to the lien and the deposit: 4 Kent's Commentaries, 12th ed. p. 153. That view is supported by *Southcomb v. Bishop of Exeter* (3), which, moreover, was a vendor's suit, and therefore is an a fortiori case. There can be no right to specific performance in this case, nor any right to recover the deposit by way of lien or in any other way.

Jenkins, Q.C., and *Quin*, for mortgagees. This is not merely a case of laches, but of abandonment. The contract was put an end to either by mutual consent or repudiation. There is no right to a lien for the deposit. In *Rose v. Watson* (1) no case of deposit, as such, arose. The rule in *Howe v. Smith* (4) is that the equitable lien for the deposit must follow the right at law: Fry on Specific Performance, 3rd ed. p. 648, 649. See also *In re Owen*. (5)

Buckley, Q.C., in reply. Down to 1890 it cannot be said that there was any delay on the part of the purchaser. A purchaser who is entitled to specific performance is not prejudiced by abstaining from bringing what cannot but prove a fruitless action.

It has been argued, on the authority of such cases as *Clegg v. Edmondson* (6) and *Lehmann v. McArthur* (7), that a continual claim not supported by action is no defence against laches; but those cases do not apply here, where the purchaser has throughout insisted on his claim, but has never been in a position to take any effective action. The test is whether the nature of the case permitted any effective action to be taken at an earlier period: *Eds v. Williams*. (8) There is no laches if it can be shewn that any action which could have been brought must necessarily have proved fruitless: *Scholefield v. Templer* (9) and *Patrick v. Milner*. (10) The discretion to grant specific per-

(1) (1864) 10 H. L. C. 672.

(2) (1852) 5 De G. & Sm. 451.

(3) (1847) 6 Hare, 213.

(4) 27 Ch. D. 89.

(5) [1894] 3 Ch. 220.

(6) 8 D. M. & G. 787.

(7) (1868) L. R. 3 Ch. 496.

(8) (1854) 4 D. M. & G. 674, 691.

(9) 4 De G. & J. 429.

(10) (1877) 2 C. P. D. 342.

formance is not excluded by the circumstances of this case. STIRLING J. The purchaser is not precluded by delay on two grounds: first, because when he pressed for completion he was invited to wait until the incumbrances should have been discharged; and, secondly, if he had brought an action he could not have obtained the relief to which he was entitled. As regards the right to a lien for the deposit, I rely upon *Rose v. Watson*. (1) Unless there has been repudiation the right to the lien remains. That being so, no difficulty is presented by *Ex parte Barrell* (2), where the purchaser had refused to perform the contract: see also *Turner v. Marriott* (3) and *Middleton v. Magnay*. (4) No Statute of Limitations applies, and this is not a case for the application of any analogy.

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Butcher, Q.C., and *Medd*, for the trustees.

Dawney and *E. Ford*, for other mortgagees.

Cur. adv. vult.

March 3. STIRLING J., after stating the facts, continued:—The short point is whether the applicant is entitled to specific performance of the contract, or whether he is not precluded by delay from enforcing it. Now I desire to point out, having regard to the argument which was used before me that as regards this contract Sir J. Sebright himself and his incumbrancers who took with notice stand in a somewhat different position. The contract is one of sale by Sir J. Sebright of his reversionary interest free from incumbrances. That imposed on Sir J. Sebright a personal liability to pay off those incumbrances and convey the property to the purchaser free from incumbrances. On the other hand, subsequent incumbrancers who took with notice of the contract were not under such personal obligation. No doubt the contract could be enforced in such a way as to defeat the incumbrances. If the contract were carried out, the incumbrances would be defeated so far as they existed on the reversion. Whether or not the incumbrancers would have taken in substitution some charge on the purchase-money would be a matter which would be determined

(1) 10 H. L. C. 672.

(2) L. R. 10 Ch. 512.

(3) (1867) L. R. 3 Eq. 744.

(4) (1864) 2 H. & M. 233.

STIRLING J. by the form of the incumbrance in each case. But it seems to me that the incumbrancers were under no such personal liability to discharge the incumbrances as was Sir J. Sebright. *Shaw v. Foster* (1), which was cited in the argument before me for another purpose, shews that that is so. Now the bankruptcy proceedings put an end to this personal liability on his part, and after that the right of the purchaser to proceed against Sir J. Sebright personally could no longer be enforced. He was bound, if he desired to make anything out of that personal right, to come in and prove under the bankruptcy, or the composition which superseded it. I assume in favour of the purchaser that down to the commencement of the bankruptcy proceedings he was insisting on the performance of the contract. But after that date neither Keays, the purchaser, nor Birch, his assignee, took any active steps to enforce their rights under the contract until May 1896, ten years after the contract was entered into. What is the rule of the Court as to delay? I take it from the judgment of Lord Cranworth in the case of *Eads v. Williams* (2), which was relied on on behalf of the applicant. He says there: "Specific performance is relief which this Court will not give unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit." The contention on the part of the applicant is that in the present case he did come as soon as the nature of the case would permit, that in point of fact the nature of the case was such that it did not admit of any effective step being taken until after the reversion had fallen into possession. I fail to see this. Assuming in the purchaser's favour that at the commencement of the bankruptcy proceedings he was not too late to bring an action, I think that after that date he might have brought an action for specific performance, offering to pay the whole balance of the purchase-money if the reversion were conveyed unincumbered, but if it were not claiming an abatement by way of compensation. I think he ought to have taken this step. It was said that the 4th clause of the agreement shewed that time was not regarded as of the essence of the contract. I think that that

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(1) L. R. 5 H. L. 321.

(2) 4 D. M. & G. 691.

is so; but at the same time the last clause which I have read appears to me also to shew that the parties did not contemplate that the time for the performance of the agreement should in any event extend until after the deaths of Sir J. and Lady Sebright. But, however this may be, the rule of the Court which I have referred to is not limited to cases where time is of the essence of the contract. In my judgment that rule binds me to hold in the present case that the applicant is not entitled to the relief he seeks by way of specific performance.

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Then I have to consider the position of the applicant in regard to the lien which he now claims. It appears from the evidence that the deposit was paid. Now, the deposit is not merely a part payment of the purchase-money, but constitutes a security for the completion of the purchase, so that if the purchaser fails to perform his part the vendor may retain it. On the other hand, if the vendor fails to perform the contract on his part, and there is no default on the part of the purchaser, the latter may, in the absence of a stipulation to the contrary, recover the deposit from the vendor. And further than that, he is entitled to a lien on the subject-matter of the contract. That was settled by the case of *Rose v. Watson*. (1) I read a few words from what was said by Lord Cranworth in advising the House: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." The question as to the right of the purchaser to a return of the deposit when he has lost his right to specific performance was considered by the Court of Appeal in *Howe v. Smith*. (2) I take the law to be as stated by

(1) 10 H. L. C. 683.

(2) 27 Ch. D. 89.

STIRLING J. Cotton L.J. in his judgment (1) : “ I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract.”

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It was there held that the purchaser had so acted as to repudiate the contract, and that therefore he could not recover the deposit; but, according to the law there laid down, the question which I have to consider is whether it is proved in this case that there were “ acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract.” Now, down to the time of the commencement of the bankruptcy proceedings, it seems to me the purchaser was insisting on his contract, and was very far from having done anything which amounted to a repudiation of the contract. At the date of the commencement of the proceedings the vendor was in default and was not in a position to insist on retaining the deposit, and the purchaser might have recovered it from him but for the bankruptcy proceedings. Those proceedings precluded him from obtaining any personal order against Sir J. Sebright, and the question is whether anything took place subsequently which amounted to repudiation on the part of the purchaser. By virtue of the lien the purchaser was a secured creditor of Sir J. Sebright. He had, therefore, open to him the usual alternatives which present themselves to a secured creditor. He might realize his security out of court and prove

for the balance, or he might value his security and prove for STIRLING J. the balance, or he might see fit to rely entirely on his security and remain outside the bankruptcy proceedings altogether. What was done was this—he took no step until 1896; but beyond this delay I cannot find that he has done any positive act amounting to a repudiation of the contract. The proper inference, therefore, appears to me to be that he has chosen to adopt the third course. No Statute of Limitations directly applies, nor do I think under the circumstances there is any statute upon the analogy of which the Court ought to act. Therefore, assuming that the right had remained altogether in Mr. Keays, the original purchaser, it seems to me that he would have been entitled to the benefit of the lien. The only question which remains is whether the fact that the right under the contract is no longer vested in Mr. Keays, but in persons claiming under him, makes any difference. Upon that the case of *Shaw v. Foster* (1) was referred to; but it does not appear to me really to have any application to the present case. If anything had been done by the persons claiming under Sir J. Sebright, in reliance on the fact that Mr. Keays remained the owner, then no doubt the rights of the assignees would have been seriously prejudiced. But I cannot see that anything of that kind happened; and therefore I think the applicant is entitled to the lien claimed.

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Solicitors: *W. P. W. Phillimore; H. Rumney; Hammond & Richards; Maples, Teesdale & Co.; Janson, Cobb, Pearson & Co.*

(1) L. R. 5 H. L. 321.

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[1897 W. 682.]

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Mortgagor and Mortgagee — Subsequent Incumbrancer — Notice — Further Advances after Notice — Covenant by Mortgagee to make Further Advances — Tacking — Priorities — Settlement — Life Interest — Alienation, Trust over on — Words of Futurity — Retrospective Operation — Past Alienation.

The doctrine in *Hopkinson v. Rolt*, (1861) 9 H. L. C. 514, that after notice of a mesne incumbrance the first mortgagee cannot, as against the later incumbrancer, tack to his debt further advances made to the mortgagor, does not apply to further advances made to the mortgagee in pursuance of an obligation or covenant on the part of the first mortgagee.

A trust in a settlement for payment of the income of the trust fund to A. for life "or until he shall assign, charge or incumber, or affect to assign, charge or incumber" the same, though future in terms, has also a retrospective operation so as to include past acts.

Manning v. Chambers, (1847) 1 De G. & Sm. 282, and *Seymour v. Lucas*, (1860) 1 Dr. & Sm. 177, followed.

WALTER WILLIAMS the elder, who died on March 5, 1892, by his will, dated February 25, 1889, devised and bequeathed his residuary real and personal estate to trustees upon trust for investment and to pay the income thereof to his son, the defendant Walter Williams, during his life, and after his decease to stand possessed of the said estate upon trusts for his children.

By an indenture of mortgage dated December 24, 1895, and made between the defendant Walter Williams of the one part, and the plaintiff Frederick William West of the other part, the defendant Walter Williams assigned his life interest under the will of his father, and also a policy of assurance on his life, to the plaintiff Frederick William West by way of mortgage for securing the repayment of 600*l.* and interest; and the plaintiff thereby agreed not to give the trustees of the will notice of the mortgage until December 24, 1896. Accordingly notice of this mortgage was not given by the plaintiff to the trustees of the will until the date hereinafter mentioned.

By a memorandum of charge of the same date the defendant

Walter Williams charged his life interest in favour of the defendant Frederick Temple as security for the repayment to him of 150*l.* and interest, but subject to the mortgage of even date to the plaintiff. No notice of this charge was given to the trustees of the will.

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By an indenture of mortgage dated April 2, 1896, and made between the defendant Walter Williams (thereinafter called "the mortgagor") of the one part, and the defendants Philip Addison Williams and Joseph William Williams (thereinafter called "the mortgagees"), who were the paternal uncles of the defendant Walter Williams, of the other part, after reciting the will, and also that the mortgagor having contracted heavy liabilities had applied to the mortgagees to assist him by advancing to him the sum of 2297*l.* and also the sum of 200*l.* per annum during a period of five years from February 15, 1896, for his personal maintenance, which the mortgagees had (subject as to the said sum of 200*l.* per annum to the conditions or limitations expressed in the indenture of settlement thereafter recited) agreed to do out of moneys belonging to them on a joint account, upon having the repayment thereof with interest secured in manner also thereafter appearing, and on condition of the mortgagor executing the said indenture of settlement thereafter recited: and also reciting that by an indenture of settlement already prepared and intended to bear even date with but to be executed immediately after the present indenture the mortgagor had assigned his equity of redemption in his interest under the said will to trustees upon certain trusts, and that the mortgagees had by such settlement covenanted with the mortgagor for payment to him, in the events therein mentioned, of the said annual sum of 200*l.*: It was witnessed that in pursuance of the said agreement, and in consideration of the sum of 2297*l.* then paid by the mortgagees to the mortgagor, the mortgagor covenanted with the mortgagees to pay to them on demand the sum of 2297*l.* with interest thereon in the meantime at the rate of 4 per cent. per annum, and also any further sum or sums of money which prior to such demand should have been advanced by or become due to the mortgagees (other than for interest) under their said

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at the rate aforesaid, and also, so long as any principal sum should remain due under the present indenture after such demand as aforesaid, to pay to the mortgagees interest thereon at the rate aforesaid half-yearly: And it was also witnessed that for the considerations aforesaid the mortgagor, as beneficial owner, thereby assigned to the mortgagees his life interest under the said will subject to a proviso for redemption on payment to the mortgagees of the sum of 2297*l.* and interest, and of such further sum or sums (if any) advanced by the mortgagees under their said covenant in the said settlement or the present indenture with interest.

The settlement of even date was made between the defendant Walter Williams of the first part, the defendants Philip Addison Williams and Joseph William Williams of the second part, and the defendants Taylor and Miére of the third part. After reciting the effect of the said will, and that the defendant Walter Williams, being pressed for money wherewith to discharge certain debts he had contracted and certain charges he had created on his interest under the said will, had applied to his uncles, the defendants P. A. Williams and J. W. Williams, to assist him, which they had agreed to do upon (amongst other things) his executing the settlement therein-after contained: and also reciting the mortgage of even date: and also reciting that, except as thereinbefore recited, there was no incumbrance affecting the life interest of the defendant Walter Williams under the said will, and that the defendants P. A. Williams and J. W. Williams had agreed to enter into the covenant on their part thereafter contained: It was witnessed that, in further pursuance of the said agreement and in consideration of the premises and of the said covenant on the part of the defendants P. A. Williams and J. W. Williams thereafter contained, the defendant Walter Williams, as settlor, thereby assigned his life interest under the said will to the defendants Taylor and Miére in trust for the defendant Walter Williams during his life or until he should assign, charge or incumber, or affect to assign, charge or incumber the same or some part thereof, &c., and after the determination of

that trust during his life, in trust during the remainder of his life, or during such shorter period as the said trustees should in their absolute discretion think fit, to apply the same for the maintenance, support or benefit of the settlor, his wife (if any) and children or remoter issue, and his sisters and their children or remoter issue. And the defendants P. A. Williams and J. W. Williams thereby covenanted with the defendant Walter Williams that if he should within eight weeks after February 15, 1896, leave England and proceed to some other country out of Europe of which the covenantors should approve, and should remain in such country for a period of five years from the date of the present settlement, and should not assign, charge, &c., his said interests under his said father's will and should not be a party to any proceedings for administering his said father's estate without the consent in writing of the trustees of the settlement, then the covenantors or the survivor of them would pay to him for the said period of five years the annual sum of 200*l.* by quarterly payments to be made through bankers nominated by the covenantors.

On July 7, 1896, notice of the indentures of mortgage and settlement of April 2, 1896, was given to the trustees of the will, but at that time neither the defendants P. A. Williams and J. W. Williams, nor the defendants Taylor and Miére, had any notice of the plaintiff's mortgage of December 24, 1895, and in fact the trustees of the will were not aware of that mortgage until January 8, 1897, on which day they received formal notice of it from the plaintiff.

Subsequently, on February 15, 1897, the plaintiff wrote to the defendants P. A. Williams and J. W. Williams offering to redeem the mortgage of April 2, 1896, but the offer was refused. The defendant Temple gave no notice to the trustees of the will of his charge.

The defendants P. A. Williams and J. W. Williams made several payments to the defendant Walter Williams on account of his annuity in pursuance of their covenant in the settlement, and they claimed that as, at the date of the execution of their mortgage, they had no notice of the plaintiff's mortgage, their mortgage constituted a first charge on Walter Williams' life

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KEKEWICH interest not only for the original advance but also for all further
J. advances made under their covenant.

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This action was then brought by the plaintiff to enforce his security by foreclosure or sale, for a declaration as to the priorities of the several mortgages, for redemption, if necessary, of the mortgages of the defendants P. A. Williams and J. W. Williams and of the defendant Temple, and for consequential relief. The plaintiff admitted the priority of the mortgage of the defendants P. A. Williams and J. W. Williams so far as it stood as a security for the 2297*l.* therein expressed to be advanced and for all sums advanced under their covenant in the settlement of even date before February 15, 1897, when they for the first time had notice of his mortgage; but he contended that his mortgage had priority over that of those defendants as regarded any sums advanced by them under the covenant after that date.

The defendant Temple admitted the plaintiff's priority and submitted to act as the Court should direct.

The action now came on for trial.

Bramwell Davis, Q.C., and Gatey, for the plaintiff. We rely on the rule in *Hopkinson v. Rolt* (1), that after notice of a mesne incumbrance the first mortgagee cannot, as against the later incumbrancer, tack to his debt further advances made to the mortgagor: Fisher on Mortgages, 5th ed. par. 1157. Therefore the defendants claiming under the mortgage of April 2, 1896, cannot tack to their mortgage debt the advances made by them after notice of our mortgage.

Sargent, for the defendants P. A. Williams and J. W. Williams. I claim priority for the mortgage of April 2, 1896, over the plaintiff's mortgage, not only for the original advance, which is admitted, but also for all further advances. This is not an ordinary commercial mortgage; it is only a mortgage of a life estate, and without any policy to support it. It is a benevolent mortgage by the uncles of the defendant Walter Williams to get him out of his difficulties. The settlement is not a voluntary settlement and is not pleaded as such: it is

made in consideration of a covenant by the uncles, and that settlement is recited in the mortgage of even date which is made in consideration of the execution of the settlement. The two deeds were thus contemporaneous instruments, and in reality constituted one family transaction—an express bargain between the uncles and the nephew. The foundation of the decision in *Hopkinson v. Rolt* (1) was that the mortgagee was under no obligation to go on making advances to the mortgagor; but here there is a distinct covenant, an obligation, to make further advances. I am, therefore, within the reasoning in *Hopkinson v. Rolt* (2), which is to the effect that where you have an arrangement in terms that the mortgagee shall make, not only a first advance, but also further advances on the faith of their being secured as a first mortgage, the mortgagee is within the same protection as he is with regard to the first advance. When a mortgagee is bound, as here, to advance moneys at a future time, he cannot be deprived of the advantage upon the faith of which he undertook the obligation. As the plaintiff expressly agreed not to give notice of his mortgage to the trustees of the will until December, 1896, he must be taken to have sanctioned the mortgagor's dealing as he pleased with his life interest in the meantime: *Perry Herrick v. Attwood*. (3)

A. R. G. Jennings, for the defendants, the trustees of the settlement of April 2, 1896. The life interest of Walter Williams is not subject to the plaintiff's mortgage. The intention of the uncles in entering into the arrangement of the mortgage and settlement of even date was that Walter Williams' life interest should not go to his creditors at all; and the Court will, in order to give effect to that intention, treat the words of the trust providing against alienation, notwithstanding they are words of futurity as having reference to the events that had occurred: *Manning v. Chambers* (4); *Seymour v. Lucas*. (5) Accordingly the plaintiff has no claim to the life interest.

A. J. David, for the defendant Temple.

(1) 9 H. L. C. 514.

(2) *Ibid.* 534-5, 553.

(3) (1857) 2 De G. & J. 21.

(4) 1 De G. & Sm. 282.

(5) 1 Dr. & Sm. 177.

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KEKEWICH *Bramwell Davis, Q.C.*, in reply. The settlement is divisible into two distinct parts, the trust of the life interest, and the covenant to make advances. There is nothing to prevent the plaintiff's mortgage attaching to the earlier part.

Cur. adv. vult.

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Feb. 15. KEKEWICH J. It was necessarily admitted on behalf of the plaintiff that his mortgage of December 24, 1895, must be postponed to that of the defendants, Philip Addison Williams and John William Williams, of April 2, 1896, as regards the sum of 2297*l.* then advanced by them, and such other sums (if any) as were advanced by them on the same security at a later date but before they received notice of the plaintiff's mortgage. It was contended that, as regards any sums advanced after the receipt of that notice, the plaintiff's mortgage has priority; and in support of this contention counsel relied on the authority of *Hopkinson v. Rolt*. (1) There is much in the report of that case depending on the conduct of the respondent, the pleadings, and the supposed authority of *Gordon v. Graham* (2), which was then finally overruled; but the point really decided is briefly, but accurately, stated in the first branch of the head-note to the report, which runs as follows: "A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances." The doctrine there laid down not merely has never been questioned—which, of course, it could not be—but has been largely applied to cases of a similar character. Neither in *Hopkinson v. Rolt* (1), nor in any of the cases which have followed it, has there been, so far as I am aware, any obligation on the first mortgagee (whose position, by reason of the omission of the plaintiff to give notice of his charge, is here filled by the defendants Williams) to make further advances; and in *Hopkinson v. Rolt* (1) the mortgage was created in

(1) 9 H. L. C. 514.

(2) 2 Eq. C. Ab. 598, pl. 16; 7 Vin. Abr. 52, E. 3.

favour of bankers and to secure a current account. It seems to me that, if once you introduce the element of obligation to make further advances, the authority of *Hopkinson v. Rolt* (1) is inapplicable; and that view is supported by more than one passage in the speeches of the Lord Chancellor (Lord Campbell) and Lord Chelmsford in the House of Lords. I do not myself see any substantial difference for this purpose between a present advance and a covenant to make certain advances at a future time on which the covenantee may maintain an action not to be answered by a plea that in the meantime the mortgagor has created another charge on the mortgaged premises.

But when the facts of this case are examined, the question between the parties does not or need not turn on the application of *Hopkinson v. Rolt*. (1) The deed of April 2, 1896, already mentioned is, standing alone, merely a mortgage; and although it contemplates further advances, and the security is extended to them as well as to the 2297*l.* then advanced, there is not in this deed any covenant to make such or any further advance. But it refers to a settlement of even date containing such a covenant, the execution of which is expressly stated to be part of the consideration of the mortgage. To that settlement I must now turn. It recites the will creating Walter Williams' life estate and the mortgage of even date, which we are now told was made in favour of two brothers of the testator and therefore uncles of the mortgagor; and then, as part of the terms of the advances actual and prospective, Walter Williams assigns his life interest to the defendants Taylor and Miére upon trusts which may be briefly described as for his benefit until alienation, and afterwards at the discretion of the trustees for the benefit of himself, his wife and children. By the settlement the two uncles covenant for the payment to Walter Williams, provided he leaves the country and remains abroad, an annuity of 200*l.* for five years. It is clear that these two documents really represent one transaction, and that it is only expressed in two documents for the sake of convenience. It is also clear that the settlement was made for valuable

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(1) 9 H. L. C. 514.

KEKEWICH consideration, and there is no suggestion that all was not done in good faith. Why should not the transaction operate as a settlement of the equity of redemption arising out of the mortgage of even date, so as entirely to oust the plaintiff's claim?

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The rule of equity is that although as between assignor and assignee an assignment of an equitable interest is perfect without notice to the trustee holding the trust property under a will or settlement, yet, as between assignees, notice is necessary to confer priority; and so long as the first assignee in point of date omits to give notice it is competent to the assignor to make a title to a more diligent stranger. This, of course, applies as much to absolute assignments as to assignments by way of mortgage; and the result is that what was assigned to the plaintiff has by his own default ceased to exist. The covenant to make further advances is of importance in proving the settlement to be made for valuable consideration; but, as regards the point just mentioned, it is unimportant because the settlement affects the equity of redemption, whatever it is, without reference to the question whether further advances were made or not. It was argued on behalf of the defendants Williams—and I take the argument to have been adopted by the other defendants—that the case might be brought within the doctrine of *Perry Herrick v. Attwood* (1) on the ground that the plaintiff in his mortgage of December 24, 1895, expressly agreed not to give notice to the trustees of the will until December 24, 1896, and that he must be taken to have sanctioned the mortgagor's dealing with his life estate as he pleased in the interval. There is no occasion to canvass this argument at length, because I have already expressed an opinion adverse to the plaintiff's claim; but, as at present advised, I do not think that the case falls within *Perry Herrick v. Attwood* (1), the short point of which was that mortgagees who had expressly sanctioned their mortgagor raising money in priority to themselves could not, as against subsequent mortgagees, complain that he had taken advantage of the sanction to raise more than they had intended. My judgment proceeds, not on express sanction, but on the omission to give notice and

(1) 2 De G. & J. 21.

on the priority consequent on that where the assignments are of equitable interests. KEKEWICH
J.

One point remains. The plaintiff is the assignee of Walter Williams' life interest under the will, and now that he has given notice is entitled to a charge on whatever remains vested in him of such life interest; and he says that the entire life interest is really in effect vested in him, because, though he no longer takes it directly under the will, he takes it under the first trust of the settlement.

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That trust is for the said Walter Williams "during his life or until he shall assign, charge or incumber, or affect to assign, charge or incumber the same or some part thereof," &c. No assignment subsequent to the date of the settlement has been proved or suggested, and the question is whether those words are strictly words of futurity, or can be construed to extend to the assignment to the plaintiff of which, be it remembered, the mortgagees of April 2, 1896, and the trustees of the settlement were ignorant. In this connection it may be as well to mention that the settlement contains a recital that there was no incumbrance of the life interest except the mortgage of even date. This point is, I think, covered by the two cases cited by Mr. Jennings, *Manning v. Chambers* (1) and *Seymour v. Lucas* (2), and there are others to the same effect.

The plaintiff, therefore, is entitled to no relief as against the mortgagees of April 2, 1896, or the trustees of the settlement of even date, and there must be judgment for them with costs. The defendant Temple is a mortgagee subsequent to the plaintiff and standing in precisely the same position. He did not agree not to give notice of his charge, but as a matter of fact he omitted to give it. It is an idle form to say that he may add his costs to his security, but that is all to which he is entitled.

Solicitors : *Weekes & Co.* ; *Mackrell & Co.*, for *Wragge & Co.*, *Birmingham* ; *Day & Son*, for *Ivens & Morton*, *Kidderminster* ; *Mann & Taylor* ; *M. Mosely & Co.*

(1) 1 De G. & Sm. 282.

(2) 1 Dr. & Sm. 177.

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In re GAGE.
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[1897 G. 1001.]

Marriage Settlement—Power of Appointment among Children—Exercise of Power—Appointment to Daughters “who shall hereafter marry”—Appointment of Income between Daughters while Unmarried—Gift over on Death or Marriage of Surviving Unmarried Daughter to other Children and any Daughters then Married—Remoteness—Perpetuities, Rule against.

By a marriage settlement in 1793 a fund was settled in trust for the husband and wife successively for life with remainder for children of the marriage as the husband and wife should jointly appoint. In 1835, there being then seven children of the marriage, including three unmarried daughters, the husband and wife appointed out of the fund 1500*l.* to be paid to each of the three unmarried daughters “who should thereafter marry”; and, so long as those three daughters, or any or either of them, should be living and unmarried, directed that the income of the residue of the fund should be paid to them, or such of them as should from time to time be living and unmarried, equally; and “in case one or two only of them should marry” (which happened) then that, after the death or marriage of such one as should be last living and unmarried, the capital of the residue should be paid to the four other children and such of the three unmarried daughters “as should marry as aforesaid,” equally:—

Held, (1.) that the ultimate gift over of the residue of the fund was void for remoteness, as the class was not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors; (2.) that the appointment of the three sums of 1500*l.* was also void for remoteness, as it could not be ascertained whether a daughter would marry within twenty-one years after the death of the survivor of the appointors; and (3.) that the appointment of the income of the residue of the fund to the three unmarried daughters was a valid appointment of one-third to each daughter so long as she was living and unmarried; but, so far as it purported to be a gift over of such one-third on her marriage, was void for remoteness.

Wainwright v. Miller, [1897] 2 Ch. 255, approved.

By the marriage settlement, dated May 17, 1793, of John Gage and Mary Millbanke, spinster, a sum of 30,000*l.* to which the lady was absolutely entitled subject to the life interest of her father, John Millbanke, was settled upon the usual trusts for the husband and wife successively for life, and after the death of the survivor for such of their children as they should by deed appoint, or as the survivor should by deed or will

appoint, and in default of appointment, for the children equally at twenty-one or marriage. The settlement contained no hotch-pot clause.

There were seven children of the marriage—two sons and five daughters—all of whom attained twenty-one.

By a deed-poll dated November 30, 1835, executed by Mr. and Mrs. Gage, after reciting the death of John Millbanke, and that there were seven children of the marriage, Mr. and Mrs. Gage, in exercise of their power, appointed that, subject to their successive life interests, the trustees of the settlement of 1793 should hold the said 30,000*l.* and the investments thereof upon trusts for payment six months after the death of the survivor of the appointors to each of the children of the marriage by name of sums amounting in all to 18,000*l.*, and upon trust out of the residue of the said 30,000*l.*, to raise and pay to each of the three then unmarried daughters, Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, “who shall hereafter marry” 1500*l.*, to be paid to her or her respective executors, administrators, or assigns, in manner following (that is to say), if she should marry during the lives of the appointors or the life of the survivor, then within six calendar months next after the death of such survivor, with interest at 4 per cent. from such death until payment; but if she should marry after the death of such survivor, then to be paid on the day of her respective marriage, or as soon thereafter as conveniently could be: And upon further trust so long as the said Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, or any or either of them, should be living and unmarried, to pay the income of the residue of the said sum of 30,000*l.* unto them or such of them as should “from time to time be living and unmarried,” and if more than one in equal shares; and if all of them should happen to marry, then upon the trusts therein mentioned; and the deed-poll then proceeded as follows: “But in case all of them, the said Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, shall die without having been married, or in case one or two only of them shall marry”—which event happened—“then upon trust that the said trustees or trustee

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KEKEWICH do and shall in the first-mentioned case, immediately after the
 J. decease of the survivor of them, the said Frances Elizabeth
 1898 Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, pay
 ~~~~~ all the said residue of the said sum of 30,000*l.*, or of such stocks  
 GAGE, funds and securities as aforesaid, and the interest dividends  
*In re.* and income of the same unto " the four other children (naming  
 HILL them) of the appointors, being two married daughters and two  
*v.* sons, " in equal shares as tenants in common, and their respec-  
 GAGE. tive executors administrators and assigns: And in the said  
 — secondly mentioned case do and shall immediately after the  
 decease or, as the case shall require, the marriage of such one  
 of them the said Frances Elizabeth Gage, Louisa Henrietta  
 Gage, and Sophia Matilda Gage as shall be last living and  
 unmarried as aforesaid pay the said residue of the said sum of  
 30,000*l.* or of such stocks funds or securities as aforesaid after  
 raising such sum or sums of 1500*l.* as aforesaid unto " the said  
 four other children (naming them) of the appointors, " and such  
 one or more of them, the said Frances Elizabeth Gage, Louisa  
 Henrietta Gage, and Sophia Matilda Gage as shall marry as  
 aforesaid in equal shares as tenants in common and their  
 respective executors, administrators and assigns."

Mr. and Mrs. Gage both died in 1846.

Of the three unmarried daughters named in the deed-poll,  
 Louisa Henrietta Gage subsequently, in 1847, married Baron  
 de Bertouche, having by her marriage settlement settled all  
 her interest under the deed-poll of 1835. On her marriage she  
 was paid 1500*l.* She died in 1880.

Frances Elizabeth Gage died unmarried in 1888, and Sophia  
 Matilda Gage, the survivor of the three, died in 1897, also  
 unmarried.

This was an originating summons taken out by the present  
 trustees of the settlement of 1793 against the trustees of the  
 will of Frances Elizabeth Gage, one of the three unmarried  
 daughters named in the deed-poll, and the representatives of  
 Louisa Henrietta, Baroness de Bertouche, and of the four  
 children respectively named in the gift over in the deed-poll,  
 to have it decided (1.) whether the appointment by the deed-  
 poll of 1835 of the residue of the 30,000*l.*, after payment there-

out of the specific sums therein mentioned, was a good exercise of the power given to Mr. and Mrs. Gage by their marriage settlement, or whether the appointment of such residue was wholly or in part void for remoteness; (2.) who were now entitled, and in what shares, to the funds subject to the settlement of 1793; and, (3.) if and so far as might be necessary, execution of the trusts of that settlement.

The first question argued was whether the ultimate gift over of the residue of the 30,000*l.* in the appointment was or was not void for remoteness.

*Mowbray Baillie*, for the plaintiffs.

*E. E. Fletcher*, for the defendants, the trustees of the will of Frances Elizabeth Gage. We claim to be interested under the trust in the settlement of 1793 in default of appointment. The lives in being here are those of the appointors, and the class must be ascertainable within twenty-one years from the death of the survivor; but under these limitations, looking to the actual as well as the possible events, the persons to take absolutely could not be ascertained until the death of Sophia Matilda Gage, the last survivor of the three unmarried daughters, in 1897, that is, more than fifty years after the death of the survivor of the appointors. The whole gift over is therefore void for remoteness, and the residue goes under the settlement as in default of appointment: *Stuart v. Cockerell* (1); *Blight v. Hartnoll* (2); *Morgan v. Gronow*. (3)

*Vaughan Hawkins*, for defendants interested under the ultimate gift over, including the trustees of the settlement of Louisa Henrietta, Baroness de Bertouche. The gift over is not void for remoteness. The appointment is in substance simply a gift to all the children, but making the shares of the three unmarried daughters defeasible on death unmarried. That is perfectly good. It is like *Wainwright v. Miller* (4), which has decided that under the exercise of a similar power of appointment an estate for life given to a child may be made:

(1) (1869) L. R. 7 Eq. 363; (1870) 5 Ch. 713. (2) (1881) 19 Ch. D. 294. (3) (1873) L. R. 16 Eq. 1. (4) [1897] 2 Ch. 255.

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determinable on the happening of a certain event at any period during the life of that child. It is a case of the cesser of an interest. There is no postponement of vesting. The interest is given at once, but it is defeasible on non-marriage: that is to say, on that event the interest is to cease. The remoteness to which the rule against perpetuities is directed is "remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them": Lewis on Perpetuity, p. 173.

R. F. Norton, and Kenyon Parker, for other defendants in the same interest.

Fletcher, in reply. This is not a case of cesser. The three daughters take no interest until they marry: that is, they are not members of the class until they marry; so that the vesting is postponed until the happening of that contingency, which, being too remote, makes the gift to the whole class bad.

KEKEWICH J. This is, to my mind, an example of an attempt to do a perfectly legitimate and proper thing in a wrong way. It seems to me that the appointors, the donees of the power of appointment, might very easily have done what they desired, and have provided for the same persons in precisely the same way as they purported to do, without raising any real question respecting the result: I say "any real question" because, though the case of *Wainwright v. Miller* (1) shews plenty of room for argument, Byrne J. seems not to have entertained any doubt as to the result; and I cannot myself doubt that if this appointment had been framed on the same lines the same result would have followed, and this appointment would have been upheld. That is to say, it would have been competent to provide that all the daughters should take, but yet to defeat the interest of any of them if she died unmarried, or on any other contingency during her life: in other words, a clause of defeasance might have been introduced, and the exercise of the power thus upheld. The difficulty, to my mind, depends entirely on the precise form of the ultimate gift over. The ultimate gift over is to certain ascertained persons—four in number;

(1) [1897] 2 Ch. 255.

and if they were the only persons there would have been no question at all, and the gift over would have been perfectly good ; so it would have been if the appointors had simply included in the gift the three unmarried daughters without any attempt to limit them as regards status or character. But the appointment adds this : “and such one or more of them the said three unmarried daughters as shall marry as aforesaid.” The words are, “as shall marry as aforesaid” ; meaning not, “as shall marry at any time after the gift over comes into operation,” but, “as shall have been married before the gift over comes into operation” ; that is to say, comes into operation by the death of the survivor of the unmarried daughters. You have, therefore, to consider whether at that point of time these three daughters, or any of them, had married ; that is, in this case in the year 1897, an indefinite time, a time, as it happens, far beyond lives in being and twenty-one years afterwards. But the question is, not whether that was bad in point of fact, but whether it could or could not be good ; and it appears to me that this is postponing the determination of the class as regards these three daughters until it can be ascertained by the death of the last survivor whether one or two or three of them were married. Unfortunately, by postponing the ascertainment of the class as regards these three daughters, you postpone it as to the four other children also, because it is a gift to them and to such of the three daughters as shall marry. It might have been easy to frame the appointment otherwise so as to arrive at the same result. It appears to me, however, that the appointors have exceeded the limit allowed by the law of perpetuities, and therefore, notwithstanding the decision in *Wainwright v. Miller* (1), I hold the appointment to be bad, and there must be a declaration to that effect.

R. F. Norton. The result of your Lordship’s decision is that the fund goes in sevenths. On that footing it becomes my interest to contend that the appointments of the sums of 1500*l.* are bad also, and that the Baroness de Bertouche has had 1500*l.* to which she was not entitled, and for which, notwithstanding

KEKEWICH J. there is no hotchpot clause, she must give credit. The case is an application of the same rule, for it cannot be ascertained whether a daughter will marry within lives in being, that is, within the lives of the appointors, and twenty-one years after the death of the survivor of them.

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Vaughan Hawkins, for the trustees of the settlement of the Baroness de Bertouche. The appointment is good. It follows from *Wainwright v. Miller* (1) that a gift to a daughter until she marries and then over to another object of the power would be good. The way to regard it is that the gift is immediately vested, though the enjoyment of it is to shift over on the happening of a certain event. So regarded, the gift is good. The law on the subject is not absolutely logical. It does not, in a settlement such as is made by an appointment of this kind, prevent the Court saying that property shall shift over from one child upon the marriage of another.

KEKEWICH J. It appears to me that I cannot, consistently with my position on the other point, hold this appointment to be good. The question may be stated in the simplest possible manner. A marriage settlement is made in the usual form, and with the usual power of appointment among the children of the marriage. An appointment is made by the husband and wife by a direction to the trustees of the settlement to hold the trust fund upon trust to pay each daughter as and when she marries a sum of 1500*l.*, and, subject to that, disposing of the rest of the trust fund, or not disposing of it, or appointing part of it to some of the children, and leaving the remainder to go as in default of appointment. The question is whether this is good, seeing that the daughters may marry more than twenty-one years after the death of the survivor of the husband and wife, and that until a daughter marries it is necessarily left uncertain what will be taken by the other children, and what is to be taken by them under the appointment or under the provisions of the settlement if there be no appointment. That seems to be obnoxious to the rule against perpetuities, although it is a very moderate provision in favour of children.

(1) [1897] 2 Ch. 255.

and might be very desirable ; but, of course, I have nothing to do with that. The point seems to be quite new. I never saw an appointment in that form myself, nor do I know of anyone else who has seen such, and no case has been cited dealing with such an appointment. I must, therefore, decide the question on principle ; and it appears to me that, on principle, the appointment is bad, and there must be a declaration to that effect.

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There will be an inquiry as to what persons are, having regard to this declaration, entitled to the trust funds.

G. I. F. C.

A summons was afterwards taken out by the defendants, the trustees of the settlement of Louisa Henrietta, Baroness de Bertouche, the daughter who married in 1847, asking that it might be declared that the trust in the deed-poll of November 30, 1835, for payment of the income of the residue of the sum of 30,000*l*. "so long as the said Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage" (the three unmarried daughters therein named), "or any or either of them, should be living and unmarried," to them or such of them as should from time to time be living and unmarried, and if more than one in equal shares, was invalid.

This summons was adjourned into court and came on to be heard on February 18, 1898.

Vaughan Hawkins, in support of the summons. This appointment of income to three persons unborn at the date of the original settlement, or such of them as should be living and unmarried at the date when the appointment under it came into operation, is wholly void for remoteness ; but even if the initial gift to the three who were at that date living and unmarried can be upheld, the implied gifts over on marriage or death are bad, as it was impossible at the time when the appointment took effect to say that the right to the income would vest in any person within the period allowed by law. *Wainwright v. Miller* (1) has no application, for there a share

(1) [1897] 2 Ch. 255.

KEKEWICH of a fund was given to one for life with vested remainders at her death, which were perfectly good in law, to two named persons, with a clause accelerating the beneficial interests in remainder in the event of the tenant for life becoming a member of the Roman Catholic Church or of any sisterhood, and when the appointment took effect the entire property vested in three named persons. Here the gift of income is entire and indivisible, and at the time when the appointment took effect the destination of the future income was uncertain.

R. F. Norton, for another defendant in the same interest, adopted the same arguments.

Mowbray Baillie, for the trustees of the will of Frances Elizabeth Gage. The decision in *Wainwright v. Miller* (1) covers the present case. In that case there was a gift to an unborn person for life with a gift over in the event of her going into a sisterhood—an event which obviously might take place at a period too remote; but Byrne J. held that the gift over being merely a determination of the life interest effectually given was not void for remoteness. The fact that the contingent interest during the life of the tenant for life was given to the persons who took vested interests in remainder was accidental, and could not affect the validity of the contingent gift. Here, as in *Wainwright v. Miller* (1), life interests are given with gifts over determining such interests in specified events. The passage in *Lewis on Perpetuity*, at p. 173, which was cited to Byrne J., and quoted by him in his judgment, is as applicable to the case before your Lordship as to the case before Byrne J.

Vaughan Hawkins, in reply.

KEKEWICH J. Let there be no doubt that I accept the decision in *Wainwright v. Miller* (1), not only as a reported decision which cannot now be appealed from, but because it commends itself to my mind, and, as I think, correctly expresses the view of Knight Bruce L.J. in *Boughton v. James*. (2) I have first to construe this gift in order to find out its legal meaning; and if and so far as the gift, according to its meaning so ascertained,

(1) [1897] 2 Ch. 255.

(2) (1844) 1 Coll. C. C. 26.

offends against the law, effect cannot be given to it. The gift is a terse and succinct one, and it is contended by Mr. Vaughan Hawkins and Mr. Norton that, as there are no limitations to the daughters separately with cross-remainders between them, the Court cannot construe this gift as one to the three daughters if unmarried, and if one marries to the other two, and so on. It is not written out in that form; but to my mind the draftsman has succeeded in expressing the same thing in a more succinct form. The gift is, so long as three persons named, or any or either of them, shall be living and unmarried, to them, or such of them as shall from time to time be living and unmarried, and if more than one in equal shares. If at the time when the appointment takes effect in possession they are all living and unmarried, they are to take between them the whole income. One would expect to find that they take equal undivided shares as tenants in common, and the testator has in fact so provided, by saying that if more than one they are to take in equal shares. So that although the gift is in form to those of them who shall be living and unmarried, it is in reality a gift of one-third to each of them. There is no gift over in express words on the marriage of any one to the others; but it seems to me that it is necessary to import such a gift over in order to give full effect to the words used. It seems to me that it is precisely the same thing as though the appointors had said, "We assume that our three daughters will be living and unmarried when the appointment takes effect, and we give to them equally the entire income of the residue of the 30,000*l.* until one of them shall marry; thenceforward we give the entire income to the two until another of them marries; and thenceforward we give the entire income to the remaining one until she marries." And then there is a gift over when all of them marry. That seems to me to be the plain meaning which the words have expressed in a succinct and accurate form. If that is so, the authority of *Wainwright v. Miller* (1) applies, and I see no reason in law why these three ladies should not take in equal thirds, so long as they were living and unmarried, as in fact they were, when the appointment took effect in possession;

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KEKEWICH and I hold that the gift to them is to that extent valid. But
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 — then, upon the construction which I put upon the will, there was a gift over in the event of one of them marrying—an event which might obviously occur at a period too remote; and I must therefore hold that those gifts over are void. Accordingly, there must be a declaration that the appointment of the income was valid as to the share of each daughter so long as she was living and unmarried, but otherwise was invalid, and that, in the events which have happened, the appointment of the one-third given to Louisa failed as from the date of her marriage in 1847, and the appointment of the one-third given to Frances failed as from the date of her death.

Solicitors: *M. & H. Turner; Leslie Field; Beachcroft, Thompson & Co.; Trower, Freeling & Parkin.*

C. C. M. D.

KEKEWICH

J.

In re VERNEY'S SETTLED ESTATES.

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[1897 V. 914.]

Feb. 18.

Settled Land—Capital Money—Rent-charge—Redemption—Repayment to Tenant for Life—Improvement—Evidence—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25—Settled Land Act, 1887 (50 & 51 Vict. c. 30), s. 1.

The tenant for life of settled estates, in order to obtain a reduction of the rate of interest payable on money borrowed for improvements and secured by rent-charges under the Improvement of Land Act, 1864, caused the rent-charges to be transferred to an insurance society on payment to the original holders of a lump sum in consideration of their consenting to the transfer:—

Held, that the repayment of this sum to the tenant for life would not be an expenditure “in redeeming” the rent-charges, “or otherwise providing for the payment thereof,” within s. 1 of the Settled Land Act, 1887, and therefore ought not to be made out of capital money in the hands of the trustees of the settlement.

The fact that the commissioners under the Act of 1864 sanctioned an improvement, in respect of which a rent-charge was created, as coming within a provision in that Act substantially identical with a provision in the Settled Land Act, 1882, was treated by the Court as evidence that such improvement was within the last-mentioned provision.

THIS was an originating summons taken out by Sir Edmund Hope Verney, as tenant for life of estates known as the Claydon

estates under a settlement dated January 13, 1868, asking that it might be declared that he was entitled to require capital moneys belonging to the settlement to be expended in redeeming or otherwise providing for fourteen several rent-charges created at different times between June 30, 1873, and December 31, 1888, under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), with the object of paying off moneys advanced for the purpose of defraying expenses of improvements on the settled estates, and to have repaid to the applicant out of such capital moneys the sum of 915*l.* 13*s.* 11*d.*, paid by him in the year 1896 in "partial redemption" of the rent-charges.

It appeared that the rent-charges were effected by the predecessor in title of the applicant, and that the total amount borrowed was 16,519*l.* Of this amount a sum of 300*l.* was expended in "new fences, partly in place of old fences become rotten with age and partly to divide the park for grazing purposes," and a sum of 109*l.* 16*s.* in "re-roofing farm buildings in galvanized iron in place of thatch."

With respect to the 915*l.* 13*s.* 11*d.*, the applicant in his affidavit in support of the application stated as follows: "In 1896 all the said rent-charges were vested in certain mortgagees of the original holders, and I procured an assignment of them to the trustees of the Clerical, Medical and General Life Assurance Society on the terms that the future payments should be reduced in such manner as to make the interest be 3½ per cent. instead of 4½ per cent., by reference to which rate the amount of the said rent-charges respectively was originally calculated. In order to procure those terms, I out of moneys of my own paid to the said Land Improvement Company the sum of 915*l.* 13*s.* 11*d.*, and I submit that such payment was a partial redemption of the said rent-charges."

On December 20, 1897, formal notice was given to the trustees of the settlement, requiring them to redeem the rent-charges and repay the 915*l.* 13*s.* 11*d.* out of capital moneys in their hands.

The trustees had upwards of 24,000*l.* in their hands applicable as capital moneys for the purposes of the Settled Land Acts. It was submitted on their behalf that the works on which the

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KEKEWICH 300*l.* and 109*l.* 16*s.* were expended were not improvements within the Settled Land Acts, and that the 915*l.* 13*s.* 11*d.* was not properly payable out of capital moneys.

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Warrington, Q.C., and *W. C. Druce*, for the tenant for life, in support of the summons. Under s. 1 of the Settled Land Act, 1887, capital money "expended in redeeming" these rent-charges, "or otherwise providing for the payment thereof," is to be "deemed to be applied in payment for an improvement authorized" by the Settled Land Act, 1882, and the tenant for life is accordingly entitled, under the provisions of ss. 21, 22, and 25 of the Act of 1882, to have the capital money in the hands of the trustees applied in redeeming or providing for the payment of these rent-charges. It is submitted that it is sufficient to shew that the improvements in question were sanctioned by the commissioners under the Improvement of Land Act, 1864, whether such improvements do or do not coincide with those authorized by the Settled Land Acts; but in fact the improvements in respect of which the rent-charges were created were "improvements of a kind authorized by the Act of 1882" within the meaning of s. 1 of the Act of 1887. The only item which can be seriously questioned is the 300*l.* in respect of fencing. That appears clearly to come within each branch of clause vi. of s. 25 of the Act of 1882, which specifies "inclosing; straightening of fences; re-division of fields"; but if there could be any doubt on the point it is removed by the fact that the commissioners under the Act of 1864 must have sanctioned this fencing as an improvement under s. 9, clause 4, of that Act, which is substantially identical with clause vi. of s. 25 of the Act of 1882. The Court, it is submitted, will accept that as evidence that the fencing was in fact an improvement of the kind authorized by the last-mentioned section.

Then as to the 915*l.* 13*s.* 11*d.*, which was paid by the tenant for life in order to obtain a reduction of the rate of interest on the money borrowed, it is submitted that it was clearly a sum paid by way of partial redemption of the rent-charges. It was a payment the benefit of which would enure not only to the tenant for life, but to those who should succeed him in the

enjoyment of the settled estates, and is within the principle of **KEKEWICH J.** *In re Lord Egmont's Settled Estates* (1), where, in a case similar to the present one, trustees were held by the Court of Appeal to be at liberty under s. 1 of the Act of 1887 to apply capital money in their hands, not only in payment of the unpaid principal money, but also of an additional sum by way of bonus on redemption.

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W. H. Coltman, for the trustees, referred to *In re Newton's Settled Estates* (2) and *In re Duke of Marlborough's Settlement*. (3)

KEKEWICH J. It seems to me that I must treat all these rent-charges as coming within s. 1 of the Settled Land Act, 1887. In order to arrive at that conclusion I must be satisfied that the rent-charges were created in respect of improvements "of a kind authorized by the Act of 1882," and it is immaterial that they were improvements of a kind authorized by the Act of 1864. If they were improvements authorized by that Act, and not by the Act of 1882, s. 1 of the Act of 1887 would have no application. The improvements in respect of which the rent-charges were created are all on the face of them improvements within the Act of 1882, with the possible exception of the sum of 300*l.* expended in new fences, "partly in place of old fences become rotten with age, and partly to divide the park for grazing purposes." I should myself entertain considerable doubt whether that does come within the Act of 1882. It can only come under clause vi. of s. 25, which specifies "inclosing; straightening of fences; re-division of fields." Mr. Druce has suggested that it comes within any one of these three objects; but if I had had no assistance from the decision of the commissioners under the Act of 1864 I should have required more argument and a fuller statement of facts in order to satisfy me that this sum of 300*l.* was expended on improvements within the meaning of the Act of 1882. But Mr. Warrington has pointed out that, with the omission of some definite articles and with other infinitesimal variations,

(1) (1890) 45 Ch. D. 395.

(2) W. N. (1890) 24.

(3) (1892) 8 Times L. R. 201.

KEKEWICH clause vi. of s. 25 of the Act of 1882 is substantially identical with the corresponding provision in s. 9 of the Act of 1864, and that the commissioners were satisfied that these improvements fell within the Act of 1864. It is impossible for me to say that the same words in the Act of 1882 mean something different from that which they were held to mean in the Act of 1864 by the competent tribunal which sanctioned the raising of the money.

[His Lordship then referred to the item of 109*l.* 16*s.* expended in re-roofing farm buildings in galvanized iron in place of thatch, and, having expressed the opinion that that was clearly an improvement within the Act of 1882, continued as follows :—]

A more difficult question remains, upon which I should have been glad to have heard more argument, but which I must now decide according to my own judgment by the light of the authorities to which I have referred. It appears that previously to December 20, 1897, when the notice was given upon which the right to have these charges paid off depends, the tenant for life arranged for a transfer from the mortgagees by whom they were held to the Clerical, Medical and General Life Assurance Society, and he stipulated, as the reduction in the normal rate of interest enabled him to do, that instead of paying interest on the loan at the rate of 4½ per cent. he should thenceforth pay 3½ per cent. That was a great advantage to him personally, and to those who might succeed him in the enjoyment of the estates previously to the determination of the rent-charges. As the consideration for that advantage he paid out of his own moneys the sum of 91*l.* 13*s.* 11*d.*, and he now seeks to have that sum paid out of the capital moneys in the hands of the trustees of the settlement. That raises a novel question, not expressly covered by any of the authorities. Under s. 1 of the Act of 1887 the tenant for life is entitled to have the capital moneys expended in “redeeming” these rent-charges, “or otherwise providing for the payment thereof.” Money expended in repaying the 91*l.* 13*s.* 11*d.* will certainly not be expended in “redeeming” the rent-charges. Redemption implies the payment of prin-

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capital, interest, and costs to the mortgagees; and the insurance society, who are the mortgagees in the present case, will not receive the 915*l.* 13*s.* 11*d.*, but only that which remains due, with interest at 3½ per cent. Would, then, the money be expended in "otherwise providing for the payment" of the rent-charges? In one sense it would, because it would be expended in providing that which the tenant for life was bound to pay and did pay in order to obtain the reduction of the rate of interest. If he had not paid it, he and his successors would now be bound to pay interest at 4½ per cent. instead of 3½ per cent. But I apprehend that the provision of the Act must be read alternatively, and that the capital money must now be expended either in redeeming the rent-charge by payment to the holder of it, or in otherwise providing for the payment thereof, and the enactment does not extend to recouping the tenant for life in respect of payments already made. That seems to me to be the natural construction of the words, and the construction which is justified by the authorities, including *In re Dalison's Settled Estate* (1), before Stirling J., and the case referred to by Mr. Druce of *In re Lord Egmont's Settled Estates* (2), where the Court of Appeal took a different view from that taken by Kay J. in *In re Lord Sudeley's Settled Estates* (3), and thought that they were bound to allow the payment out of capital money of a bonus which the tenant for life was obliged to pay in order to redeem. In the ordinary case of a mortgage with a provision that the mortgage debt shall remain for a term certain, if redemption is desired during the continuance of the term, the mortgagee may say that he is not bound to be redeemed at once, and that something additional must be paid to him in order to purchase the right of immediate redemption, and the sum so paid fairly comes within the description of money paid in redeeming the mortgage. So in the present case, in order to effect redemption it might be necessary to pay a bonus to the insurance society, and the bonus so paid would be part of the money for redemption. But that does not seem to me in the least to cover money paid

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(1) [1892] 3 Ch. 522.

(2) 45 Ch. D. 395.

(3) (1887) 37 Ch. D. 123.

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It was not part of the redemption money, but money paid by him voluntarily, in part for his own benefit, before the date on which he became entitled to call upon the trustees to expend the capital money in their hands. On those grounds, I am of opinion that this sum of 915*l.* 13*s.* 11*d.* ought not to be repaid out of the capital money in the hands of the trustees. There is, however, a further ground which, although I do not desire to rely upon it, seems to me to deserve consideration—namely, that the payment of this sum by the tenant for life was only a payment of interest. When you come to redeem you pay principal, interest, and costs, but you do not recoup to the tenant for life payments which he has made by way of interest. I am aware that though the tenant for life paid the money in the hope that he would live long enough to obtain the whole benefit of it, yet the payment might enure for the benefit of the estate. Nevertheless, it was a payment in respect of interest, and not capital. I think, therefore, that the repayment of this sum of 915*l.* 13*s.* 11*d.* to the tenant for life out of capital money cannot be made, but on the rest of the summons a declaration may be made as asked.

Solicitors: *Twisden & Co., for Hearn & Hearn, Buckingham ; Western & Sons.*

C. C. M. D.

In re MAYNARDS, LIMITED.KEKEWICH
J.

Company—Shares—Issue of, as fully paid—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Registered Contract—Sufficiency—Statement of Consideration—Property purchased described merely by Reference—Rectification of Register—Form of Order.

1898

Feb. 25.

Where the contract registered under s. 25 of the Companies Act, 1867, on the issue of fully paid shares as part of the consideration for the sale of property to a company, sufficiently described the vendor and the company, and the amount and mode of payment of the purchase-money, but described the property sold merely by reference to the schedule to a previous contract:—

Held, on the authority of *In re Kharushkoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. 451, that the consideration for the issue of the shares was insufficiently stated, and that an order ought to be made for the rectification of the register of shareholders.

The order for rectification in such a case ought simply to direct that the name of the shareholder should be struck off the register, and ought not to direct the registration of another contract and subsequent registration of the name: see Chadwyck Healey on Companies, 3rd ed. p. 384.

MOTION.

By an agreement dated March 14, 1896, and made between Charles Riley Maynard of the one part, and a trustee on behalf of an intended company to be called Maynards, Limited, of the other part, it was agreed that Maynard should sell and the company when incorporated should purchase free from incumbrances, (a) the businesses and property mentioned in the first part of the schedule thereto, and (b) the leasehold hereditaments and tenancies, short particulars whereof were set out in the second part of the schedule thereto. The consideration for the sale was to be the sum of 40,000*l.*, to be paid and satisfied as follows, namely, as to the sum of 15,000*l.* in cash, and as to the further sum of 10,000*l.* in cash or fully paid preference or ordinary shares taken at par value, or partly in each, at the option of the company, and as to the sum of 15,000*l.* by the allotment to Maynard of 7500 fully paid-up preference shares and 7500 fully paid-up ordinary shares in the capital of the company of 1*l.* each. It was also agreed that the company should cause the contract, or some sufficient contract, to be filed

KEKEWICH with the Registrar of Joint Stock Companies before any fully paid-up shares were issued. The schedule to the agreement contained a full description of the businesses and property and leasehold premises intended to be sold to the company.

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The intended company was duly registered by the name of Maynards, Limited, on March 19, 1896, with a nominal capital of 140,000*l.*, divided into 140,000 shares of 1*l.* each, of which 60,000 were 6 per cent. preference shares and 80,000 were ordinary shares; and by an agreement of March 30, 1896, indorsed on the agreement of March 14, 1896, the company adopted and confirmed the last-mentioned agreement.

On April 25, 1896, an agreement in writing was entered into between C. R. Maynard (therein called the vendor) and the company, which, after naming the parties, proceeded as follows: "Whereas by an agreement (hereinafter referred to as the principal agreement) dated March 14, 1896, and made, &c., it was agreed that the vendor should sell and the company when incorporated should purchase free from all incumbrances, (a) the businesses and property mentioned in the first part of the schedule thereto, and (b) the leasehold hereditaments and tenancies, short particulars of which are set out in the second part of the schedule thereto, and that the consideration for the said sale should be the sum of 40,000*l.*, which should be paid and satisfied as to the sum of 15,000*l.* in cash and as to the further sum of 10,000*l.* in cash or fully paid preference or ordinary shares taken at par value, or partly in each, at the option of the company, and as to the sum of 15,000*l.* by the allotment to the vendor or his nominees of 7500 fully paid-up preference shares and 7500 fully paid-up ordinary shares in the capital of the company of 1*l.* each"; and, after a recital of the agreement of March 30, 1896, the agreement in statement proceeded as follows: "Now these presents witness that it is hereby agreed as follows: (1.) The company shall forthwith cause this agreement to be filed with the Registrar of Joint Stock Companies. (2.) The company shall on completion of the said purchase pay in cash to the vendor or his nominees the sum of 10,000*l.* in payment and satisfaction of the sum of 10,000*l.* by the principal agreement expressed to be payable in cash or fully paid-up

preference or ordinary shares, and the company shall also allot to the vendor or his nominees 7500 fully paid-up preference and 7500 fully paid-up ordinary shares in the capital of the company of 1*l.* each. (3.) The said 7500 ordinary shares shall be numbered [here followed the numbers], and the same shall be credited in the books of the company as fully paid up, and as so credited shall be accepted by the vendor in full satisfaction of the sum of 15,000*l.*, portion of the consideration mentioned in the principal agreement. In witness," &c.

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The agreement of April 25, 1896, did not contain any copy of the schedule to the agreement of March 14, 1896, or any further reference to the property comprised therein. It was duly filed with the Registrar of Joint Stock Companies on May 7, 1896, and on the same day the company issued to C. R. Maynard 7500 preference shares as fully paid up, and 7500 ordinary shares as fully paid up.

In consequence of the decision of the Court of Appeal in the case of *In re Kharaskhoma Exploring and Prospecting Syndicate* (1), the legal advisers of C. R. Maynard expressed a doubt whether the agreement of April 25, 1896, was sufficient to comply with s. 25 of the Companies Act, 1867, and advised him that it was possible that the consideration for the issue to him of the shares as fully paid up might be held to be not sufficiently set out; and in consequence of this advice C. R. Maynard now applied to the Court that the registers of members of the company might be rectified by striking out the name of the applicant as the holder of the 7500 ordinary shares and 7500 preference shares. The notice of motion went on to ask that upon the agreements of March 14, 1896, and March 30, 1896, and such further and other agreement as was sufficient to comply with the statute being filed, new shares in the company might be directed to be issued to the applicant.

There was evidence that the transaction was a bonâ fide one, and that the company was solvent.

Warrington, Q.C., and *Whinney*, for the applicant. The doubt which has arisen in this case is whether the consideration

KEKEWICH J. for the sale of these shares is sufficiently stated in the contract filed under s. 25 of the Companies Act, 1867, and unless the Court is of opinion that the statement is sufficient, the applicant asks for the rectification of the register. The doubt is caused by the fact that the Court of Appeal in *In re Kharaskhoma Exploring and Prospecting Syndicate* (1) guarded themselves from saying what degree of particularity in the registered contract was necessary in order to give sufficient information to the public. It is to be observed that in that case the registered contract merely referred to the original contract, and stated that "for the considerations therein mentioned" the company had agreed to allot the shares as fully paid up. Vaughan Williams J. thought that the registered contract was sufficient, but all the judges of the Court of Appeal thought otherwise. In this contract there is a fuller statement of particulars, but the doubt is whether the contract sufficiently describes the property for the purchase of which the shares were issued as fully paid up, and it is feared that it may be said here, as it was in the *Kharaskhoma Case* (1), that the person who goes to the register does not find the whole contract there, but only a part of it. It is true that in the *Kharaskhoma Case* (1) Lopes L.J. appears to have intimated that it would have been sufficient if the contract had said "for goods bargained and sold," and if that were so this contract would be sufficient; but there are passages in all the judgments which point in a different direction. There is a further doubt which may be raised, and which was not adjudicated upon in the *Kharaskhoma Case* (1), namely, that it may be said that the contract to be filed under s. 25 of the Companies Act, 1867, must be the contract under which the consideration moves, and upon which the company as purchasers, or the shareholder as vendor, must sue. On the whole it is submitted that this contract is not sufficient, or that the sufficiency of it is so doubtful that an order for the rectification of the register of shareholders ought to be made.

Vernon, for the company, said that he was not instructed to offer any argument, and suggested that the Court, if it enter-

(1) [1897] 2 Ch. 451.

tained any doubt as to the sufficiency of the contract, would be justified, without deciding the point, in ordering that the register of shareholders should be rectified.

Kirby, for a member of a committee of shareholders.

[As to the form of the order to be made, KEKEWICH J. referred during the argument to Chadwyck Healey on Companies, 3rd ed. p. 384, where it is stated that, "In *In re Darlington Forge Co.* (1) North J. said that the new shares could be issued under the seal of the company, but in *In re New Eberhardt Co.* (which is not reported on this point) the Court of Appeal refused to follow this, and said that the only order which could be made was to strike the names off the register, and that the order ought not to direct the registration of a contract and subsequent registration of the names, which were for the company to do."]

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KEKEWICH J. [After observing that it had been suggested that he should be content to say that there was a doubt whether the contract was sufficient or not, but that in his opinion it was his duty to pronounce a decision upon the point, and after expressing his regret that the question had not been fully argued, and that consequently his decision might not be a binding authority, continued as follows :—]

The question is whether this contract of April 25, 1896, is sufficient within s. 25 of the Companies Act, 1867, the objection to it being that the consideration for the issue of these fully paid-up shares is not sufficiently stated. In the first place, it may be said that it is not a contract at all, and in one sense it is not, for it is in reality only a memorandum of the original contract, or, as it is termed, a confirmatory contract. But to my mind it is far too late in the day to say that a confirmatory contract is not sufficient within the meaning of the Act. It may be said that, technically, when once parties have made a binding contract, they cannot make another contract which is only an embodiment of the previous contract, and say that it is the contract between them. But there is no doubt that a short confirmatory contract is sufficient for the purposes of this

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enactment. It has always been so regarded, and to hold otherwise would be uselessly to endanger properties held under a confirmatory contract registered in the same way as this contract. I put that consideration aside; but whether it is called a confirmatory contract, or by any other designation, it must have all the elements of a contract. That I understand to be the foundation and substance of the decision of the Court of Appeal in the case of *In re Kharaskhoma Exploring and Prospecting Syndicate*. (1) For the present purpose, Chitty L.J. puts the matter more directly and plainly than the other Lords Justices. He says (2): "Now what is the object of the section? Publicity—to give information by registering the contract to any person who proposes to deal with the company either by way of becoming a shareholder, or lending money or the like. He is to go to the register to find—what? To find the contract. He goes to the register in this case, but he does not find the contract: he finds part—half, as it were—of the contract." The Lord Justice does not mean that a confirmatory contract may not be registered, or that the whole contract must be registered, but that the whole of that part of the contract which affects the transaction between the company and the shareholder must be registered, so as to shew all the elements of that contract. You have not got a contract if you omit the name of the vendor, or the name of the purchaser, or the amount of the consideration, or a fair description of the thing to be purchased. No doubt the cases as regards real property run very fine on each of those four points, and different judges have taken different views; but it is clear that those four requirements must be complied with. In the present case the names of the vendor—i.e. the proprietor, who is to take the shares—and of the purchasers—i.e. the company, who is to allot the shares—and the nature and amount of the price are fully stated. But is there a description of the thing which is to be purchased—the property in exchange for which the shares are to be allotted as fully paid up? Before I refer to the terms of the contract I will quote these further words of Chitty L.J.: "This judgment of ours will not in any way affect the question with what

(1) [1897] 2 Ch. 451.

(2) [1897] 2 Ch. 468.

degree of particularity the consideration must be stated in the contract. If the consideration is, for instance, a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa, and will form his own opinion about it." I do not suppose the Lord Justice meant to say that a reference to a concession in South Africa, without more, would be sufficient. "So if it is furniture supplied to an hotel company, he may be able to go at once and see what that furniture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade, the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated." The Lord Justice is there thinking of the furniture supplied to an hotel company, which is in an hotel specified in the registered contract, and when he speaks of goodwill and stock-in-trade he means the goodwill and stock-in-trade of a particular business described in the contract. Apply that to this contract, and what is required is something which may fairly be regarded as incorporated into the contract as shewing the substratum of it. What, then, do we find? The contract contains a recital that by an agreement dated March 14, 1896, the vendor has agreed to sell, and the company when incorporated has agreed to purchase, "(a) the businesses and property mentioned in the first part of the schedule thereto, and (b) the leasehold hereditaments and tenancies, short particulars of which are set out in the second part of the schedule thereto." So that in some schedule which he cannot look at, the person who proposes to deal with the company is told that he will find short particulars. He does not know whether there is one leasehold house or fifty, whether they are let at a rack-rent or a building rent—in fact, he knows nothing whatever about it, and cannot find it out from the contract. It seems to me that it is idle to say that the terms of the contract are set out when one of the most important elements of the contract—namely, the property which is the subject-matter of it—is described by reference to a schedule which you cannot see. It seems to me that though Chitty L.J. says that the judgment of the Court of Appeal will not affect

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KEKEWICH the question with what degree of particularity the consideration must be stated, yet that judgment shews that there must be some degree of particularity, and there is no particularity here. To say that the property is fully described in the document last mentioned is precisely the same thing for this purpose as if the property were not mentioned at all. I have thought it my duty to express an opinion, and I have no doubt myself that this contract is insufficient, and that these shares have not been duly issued as fully paid up. The result is that, as there is no doubt about the intention of the parties, the register must be rectified.

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As to the form of the order, I referred to the passage in Chadwyck Healey on Companies, 3rd ed. p. 384, and I may observe that I have frequently acted upon that statement since my attention was first called to it, and I have done so the more readily because the adoption of the course there indicated seems to make the cases consistent. It has always seemed to me that the only duty of the Court is to rectify the register. Here is a man who has been put on the register in respect of shares which are not fully paid up. That is an error. His bargain with the company was to have shares fully paid up, and he has not got them. The result is that his name must be struck off the register. It may be, and in this case I have no doubt it is the fact, that he has a right to be put on in respect of fully paid-up shares; but that is not rectification, but a matter to be done afterwards. I have always felt considerable doubt about the propriety of an order, in the form contemplated by this notice of motion, that on something being done which has not been done, something else should be done to the register. I venture to think what Mr. Chadwyck Healey tells us was the view of the Court of Appeal in *In re New Eberhardt Co.* is right, and that the order which was made in that case is the only order which ought to be made in this case, namely, that the name of the applicant be struck off the register of shareholders.

Solicitors: *E. C. Rawlings & Butt; Vernon, Son & Stephen; Harries, Wilkinson & Raikes.*

C. C. M. D.

In re AVERILL.
SALSBURY *v.* BUCKLE.

[1897 A. 1904.]

ROMER J.

1898

Feb. 24.

*Will—Contingent Remainders—Infants—Intermediate Rents—Legal and
Equitable Limitations.*

A testator by his will dated in 1878 devised certain real property to the use of trustees in fee simple upon trust for A. for life, and after her death for her children who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common. The testator died in 1881; A. died in 1885, leaving six children, all infants and unmarried. The eldest child attained twenty-one in March, 1897:—

Held, that the eldest child was entitled on attaining twenty-one to the entirety of the rents until the next child attained a vested interest, and so on, as if the limitations had been legal.

WILLIAM AVERILL by his will, dated June 21, 1878, devised and bequeathed all his freehold, copyhold, and leasehold hereditaments to trustees therein named upon trust to pay the rents and profits to his wife Susan Averill for life, and after her decease, as to all his freehold real estate situate at Inkberrow and Dormstone, upon trust to pay the rents and profits to Annie Buckle for life for her separate use without power of anticipation; and after her decease the testator declared that the trustees should stand possessed of the last-mentioned real estate (in the events which happened) in trust for the children of Annie Buckle who being sons should attain twenty-one, or who being daughters should attain that age or marry under that age, as might be living at her decease, and the issue of such of them as should have then died leaving issue him or her surviving, to be divided between them, if more than one, as tenants in common.

The testator died on January 9, 1881; and his widow, Susan Averill, died on December 9, 1885.

Annie Buckle died on February 22, 1885, leaving six children, of whom the eldest, Annie Emma Buckle, attained twenty-one on March 13, 1897.

By an order made by Chitty J. dated February 1, 1887, on

ROMER J. an originating summons (*In re Averill, Buckle v. Coombe*,
 1898 [1886] A. 1012), it was declared that the legal estate in the
 AVERILL, Inkberrow and Dormstone estates was vested in the then
In re. trustee of the will, and that the interests of the children of
 SALSBUURY Annie Buckle of and in the said real estates vested contingently
 v. on their severally attaining twenty-one, or, being females,
 BUCKLE. marrying under that age, and that in the meantime the property
 vested in the testator's heir-at-law.

The present summons was issued for the purpose of determining whether Annie Emma Buckle was entitled as from March 13, 1897, to the entirety of the rents and profits of the Inkberrow and Dormstone estates until one of the other children of the said Annie Buckle attained twenty-one, or, being a female, married.

Church, for the trustees and the infants.

Ball, for Annie Emma Buckle. In legal limitations the estate vests in the first person who fulfils the conditions of the will, and the class opens to admit the other children as they attain twenty-one: *Holmes v. Prescott*. (1) The same rule applies to equitable estates, as equity follows the law: *In re Burton's Will* (2); *Genery v. Fitzgerald* (3); *Furneaux v. Rucker*. (4)

[ROMER J. referred to *In re Holford* (5) and *In re Jeffery*. (6)]

Church. I submit that the rule does not apply to equitable estates, where the result would be to work great unfairness. I admit that if Annie Emma Buckle had died before attaining a vested interest the infants would not be entitled to the rents.

ROMER J. This is a case of real estate, and, in my opinion, had the limitations in this will with regard to real estate been legal instead of equitable, it is clear that on the eldest child attaining twenty-one that child would have been entitled to the whole of the income until the next child attained twenty-one, when that child would have to share, and so on as the other children attained twenty-one.

That being the case with regard to legal limitations, does it

(1) (1864) 33 L. J. (Ch.) 264.

(2) [1892] 2 Ch. 38.

(3) (1822) Jac. 468.

(4) W. N. (1879) 135.

(5) [1894] 3 Ch. 30.

(6) [1891] 1 Ch. 671.

make any difference that the estates here are equitable—that there are trustees? I think not. Usually equity follows the law; and where if the estate had been legal certain rights would accrue to the beneficiaries, corresponding rights also accrue, and only corresponding rights, in the case of equitable trust estates. In this case I see no sufficient reason for departing from the rule.

I therefore hold that the eldest child on attaining twenty-one became entitled to the whole income until the younger children severally acquire vested estates.

Solicitor for all parties: *Kenard Ball, for A. R. Hudson, Pershore.*

G. M.

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[1896 H. 3144.]

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March 17, 18,
19, 22.

Practice—Costs—Injunction—Dismissal of Action against Corporation—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, sub-ss. (b), (c).

The word “action,” as used in s. 1 of the Public Authorities Protection Act, 1893, includes all actions in the Chancery Division, whether actions for an injunction or actions partly for an injunction and partly for damages. Therefore in any such action against a public authority judgment for the defendants carries the right to an order for costs to be taxed as between solicitor and client, and the Court has no discretion in the matter.

THIS was an action commenced by the plaintiffs, who were trustees under the will of one George Harrop and the owners of certain freehold land and premises at Stoors Hill, Ossett, in the county of York, for an injunction to restrain the defendants, the Mayor and Corporation of Ossett, from using certain buildings at Stoors Hill as a hospital for small-pox patients, and from receiving or treating in or at such buildings any persons suffering from small-pox. The plaintiffs also claimed damages.

The action was in fact a quia timet action, and at the hearing the plaintiffs claimed an injunction only. In the result the

ROMER J. action was dismissed, and the only question calling for a report
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 HARROP was that of the costs of the action, the defendants asking for
 v. costs as between solicitor and client under s. 1, sub-s. (b), of
 OSSETT the Public Authorities Protection Act, 1893. (1)
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Cozens-Hardy, Q.C., and J. G. Wood, for the defendants.
 Sect. 2 of the Act of 1893 entirely repeals s. 264 of the Public Health Act, 1875. That section provided that an action should not be commenced without preliminary notice, it also provided for a special local venue, and what may be called a special Statute of Limitations. The reason why it was held in *Flower v. Local Board of Low Leyton* (2) that the section did not apply to an action for injunction was because the provision as to preliminary notice did not apply to such a proceeding. There is no provision in the Act of 1893 for a preliminary notice, and the only thing that remains is that the action must be brought within six months. Sub-s. (b) is entirely new: no such provision is to be found in the Public Health Act, 1875. Sub-s. (c) is in part the same, but it contains these most important words: "this provision shall not affect costs on any injunction." That sub-section deals not merely

(1) 56 & 57 Vict. c. 61, s. 1:
 "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

"(b) Wherever in any such action

a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:

"(c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action."

(2) (1877) 5 Ch. D. 347.

with an action for damages, but it contemplates both actions for damages and actions for injunction. We therefore submit that the defendants are entitled to costs as between solicitor and client.

Macmorran, Q.C., and *Clare*, for the plaintiffs. The Act of 1893 was intended to replace s. 264 of the Public Health Act, 1875. Sect. 2 of the Act of 1893 repeals so much of the Act of 1875 as requires proceedings to be commenced at any particular place, or within any particular time, or notice of action to be given. Sub-s. (b) of s. 1 refers to the same kind of action that the rest of the section refers to, and does not refer in any shape or form to an action for injunction. Sub-s. (c) does not affect the true meaning of sub-s. (b), which applies only to actions which are within the Act just as they would have been within s. 264 of the Act of 1875, and that did not include actions for injunction. The section applies only to actions of tort in which damages are claimed: that is the substance of the Act, and that is what it was intended to provide for. If the Act of 1893 is to be held to extend to all kinds of actions it will include actions on contract, and actions for recovery of land and the like, to all of which it has been held that s. 264 does not apply. We submit that the defendants are not entitled to costs as between solicitor and client.

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ROMER J. The word "action" as used in the Act of 1893 refers to every action, and not to an action for damages or substantially for damages only. In considering this Act I see no sufficient reason for cutting down the generality of the word "action" or limiting it in any way. I do not see why it should be limited. In my opinion the word "action" as used in this statute includes all actions in the Chancery Division, whether actions for an injunction, or actions partly for an injunction and partly for damages. Looking at s. 1, sub-s. (a), it is clear to my mind that an action for an injunction could be brought and would be brought within its provisions, and the wording of sub-s. (c) to my mind tends also to shew that an action for an injunction is contemplated as an action falling within the purview of the statute.

ROMER J. I think, therefore, that the word "action" covers the case of the action before me, and it appears to me that on the wording of the Act, where judgment is given for the defendant simpliciter the Court has no discretion in the matter, and that, judgment having been given for the defendants in this action, I must of necessity follow the statute and give the defendants costs as between solicitor and client. I am not deciding that in a proper case the Court has not power so to shape its judgment as to deprive a defendant of costs.

Solicitors for plaintiffs: *Chester & Co., for Ianson & Co., Wakefield.*

Solicitors for defendants: *Baker, Lees & Postlethwaite, for W. Brook, Ossett.*

G. M.

In re HUGHES.
BRANDON *v.* HUGHES.

[1896 H. 3189.]

Married Woman—Protection Order—Feme Sole—Property—Contract—Debts and Liabilities—Assets—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 25, 26—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4.

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A married woman, while under a protection order obtained by her under s. 21 of the Matrimonial Causes Act, 1857, is in the position of a feme sole as regards all property coming to her after the date of the order (s. 25), and also for all purposes of contract (s. 26): so that her execution by will since the Married Women's Property Act, 1882, of a general power of appointment created subsequently to the date of the protection order makes the property appointed liable, under s. 4 of the latter Act, for debts or liabilities incurred by her while under the order, even though they may have been incurred before that Act, s. 4 extending to an appointment since the Act by a married woman who had debts and liabilities existing at the date the Act came into operation.

Decision of Kekewich J. affirmed.

UNDER a settlement dated February 8, 1864, certain trust funds were settled by Mrs. Agnes Ann Windham, then the wife of William Frederick Windham, upon trusts for the payment of the income thereof to her during her life for her separate use without power of anticipation, and after her death for the children of her marriage at twenty-one or marriage.

William Frederick Windham died in 1866 leaving issue of his marriage one child only, a son.

On July 16, 1868, his widow married George Walker, and by a settlement dated November 6 following, executed by Mr. and Mrs. Walker in pursuance of ante-nuptial articles, it was agreed (amongst other things) that the income of the trust funds to which Mrs. Walker was entitled for her life under the settlement of 1864 should thenceforth be held and enjoyed by, and paid to, her for her separate use without power of anticipation, and independently of her then or any future husband.

On February 9, 1880, Mrs. Walker obtained a protection order against her husband under s. 21 of the Matrimonial

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Causes Act, 1857 (20 & 21 Vict. c. 85). Walker subsequently disappeared, and it was unknown whether he was now alive or dead.

By an indenture dated March 6, 1880, and made between Mrs. Walker of the one part, and John Cole Stogdon, her solicitor, of the other part, after reciting the effect of the two settlements and the protection order, Mrs. Walker, in consideration of a sum of 450*l.* therein expressed to be due and owing by her to Stogdon, covenanted with him to pay the said sum of 450*l.* and any sum or sums of money which might become due on the footing of that security on August 31, 1880, together with interest thereon in the meantime at the rate of 7 per cent. per annum; also to pay interest on the 450*l.* half-yearly if not paid on that day. And Mrs. Walker assigned to Stogdon all moneys which should become due to her by way of income under the two settlements of 1864 and 1868, by way of mortgage for securing payment of the said principal moneys and interest. And it was thereby agreed that the security should be available to secure the repayment to Stogdon of all principal moneys, interest, costs, fees and expenses then or thereafter payable by Mrs. Walker to him; and that the security should not cover a larger sum than 800*l.* exclusive of interest.

By an indenture of resettlement dated July 23, 1894, executed by Mrs. Walker, therein called "Agnes Ann Hughes, the wife of Rowland Jones Hughes," and by her son and only child (then of age) by her marriage with Mr. Windham, the capital trust funds comprised in the settlement of 1864 were resettled upon trust to pay 3000*l.* to the son, and, subject thereto, in trust for such persons as Mrs. "Hughes" should by will appoint.

By her will dated July 9, 1895, Mrs. "Hughes," who therein described herself as "the wife of Rowland Jones Hughes," after various legacies, appointed Edgar Morris Brandon her executor and trustee. And she gave her residuary real and personal estate to her "husband, the said Rowland Jones Hughes." And she directed that her will should operate as an appointment under every power her thereunto enabling.

Mrs. "Hughes" died on March 24, 1896. On October 7,

1896, an originating summons for the administration of her estate was taken out by her executor against the residuary legatee, and judgment for administration was granted on May 31, 1897.

On November 10, 1896, Stogdon, in consideration of a sum of 50*l.*, assigned the benefit of his security of March 6, 1880, to Frederick Lovell Keays. Keays then took out a summons in the action, claiming to be allowed to stand as a creditor of the estate of the testatrix for 2337*l.* 9*s.* 7*d.*, as being the total sum due for principal, interest, and costs under the security.

In opposition to the claim the plaintiff, the executor, filed an affidavit stating that Mrs. Hughes, or Walker, had not at the date of the deed of March 6, 1880, and never had, any separate property of her own except the income of the funds subject to her two settlements, as to which she was restrained from anticipation: that the only property she had at her death consisted of certain furniture and effects (subject to a bill of sale) and an interest—the value of which was at present unascertained—in certain funds in court to the credit of an action of *Gibbon v. Fox*, a mortgagee's action claiming certain arrears of income of the trust funds subject to the settlement of 1864; and he submitted to the Court whether under the circumstances Keays was entitled to rank as a creditor against the estate at all: that he, the plaintiff, had no means of ascertaining how the sum alleged to be due for costs or otherwise was arrived at, and that if Keays was entitled to prove against the estate of Mrs. Walker in respect of the said costs, or any part thereof, the same ought to be taxed.

Keays' summons was adjourned into Court, and came on for hearing before Kekewich J. on November 18, 1897.

Warrington, Q.C., and *Dauney*, for the applicant. Under ss. 21, 25, and 26 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) (1), the effect of the protection order of February 9,

(1) The following sections of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), were referred to in the course of the argument.

By s. 21 a wife deserted by her

husband may apply to a police magistrate, justices in petty sessions, or to the Divorce Court for an order to protect her earnings or any property which she may become possessed of

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1880, was to place Mrs. Walker in the position of a feme sole as regarded her power to contract; she was therefore capable of binding herself by her contract of March 6, 1880, and she remained bound by it till her death. The debt created by that contract was thus her debt, and one for which she could have been sued under s. 26. Then the will by which she appointed the property over which she had a general power made that property assets for payment of her debts just as if she had been a man or a widow. The principle of *In re Ann* (1), though that was a case under s. 4 of the Married Women's Property Act, 1882, applies to the present case; the terms of the Matrimonial Causes Act, 1857, are, however, much wider, for ss. 25 and 26 expressly say that the wife shall, after a protection order or a decree for judicial separation, be considered, in respect of property and for purposes of contract, a "feme sole."

J. Tanner, for the plaintiff, the executor. The question here is as to the liability of the property of a married woman for her contracts. The object of the Matrimonial Causes Act, 1857,

after such desertion, "against her husband or his creditors or any person claiming under him If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

Sect. 25: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same

would have gone if her husband had been then dead: provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

Sect. 26: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant. . . ."

(1) [1894] 1 Ch. 549.

was simply to protect a wife who had obtained a protection order from her husband and his creditors. Although the Act says that she shall be "considered as a feme sole," she has not the status of a feme sole: her status is still that of a married woman, though she may contract like any other married woman—that is, as to her separate estate. Mrs. Walker, being then a married woman, could only contract in respect of her separate estate; but at the date of the contract of March 6, 1880, she had no separate estate beyond a life interest, as to which she was restrained from anticipation, and this, therefore, she could not bind: *Hill v. Cooper*. (1) The Married Women's Property Act, 1882, does not affect the present question, as it was passed after the date of the contract. Sect. 4 does not affect debts or other liabilities incurred by the married woman before the passing of the Act. A judgment against a married woman can only affect separate estate which she had at the date of the contract and which has continued hers up to the judgment: *Palliser v. Gurney*. (2) And the general engagements of a married woman only affect separate estate to which she was entitled free from restraint on anticipation at the time she entered into them: *Pike v. Fitzgibbon*. (3) *Waite v. Morland* (4) and *In re Insole* (5) do not touch the question of the effect of a married woman's covenant. *In re Ann* (6), related to a contract entered into by a married woman after the commencement of the Married Women's Property Act, 1882, and depended on the construction of s. 4 of that Act. That Act does not apply to contracts entered into before its commencement: *In re Roper*. (7) With regard to the amount of the claim, all that the applicant can claim under the security of March 6, 1880, is the 450*l.* and the interest on it, for that is the extent of the covenant. There is no covenant to pay any principal sum except the 450*l.*, and there is no covenant to pay interest on anything else. Again, the evidence in support of this claim is insufficient, for a claim against the estate of a

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(1) [1893] 2 Q. B. 85.

(2) (1887) 19 Q. B. D. 519.

(3) (1881) 17 Ch. D. 454.

(4) (1888) 38 Ch. D. 135.

(5) (1865) L. R. 1 Eq. 470.

(6) [1894] 1 Ch. 549.

(7) (1888) 39 Ch. D. 482.

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deceased person cannot be maintained on the unsupported evidence of the claimant: *In re Finch*. (1)

Warrington, Q.C., in reply. *Hill v. Cooper* (2) did not deal with s. 26 of the Act of 1857 at all; and there the property sought to be bound had been acquired before the judicial separation. Sect. 26 is unlimited in its terms, for it says that "the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract." In the absence of authority on that section, I ask your Lordship to follow the literal words, and to hold that Mrs. Walker was capable of entering into this contract, and that, under s. 25, this property, which she acquired after the date of the protection order, is bound by the contract. *In re Roper* (3) is not an authority on this point: all it decided is that what are improperly called "debts" of a married woman are, more properly speaking, "engagements" of a married woman binding her separate estate; that they are not, strictly speaking, "debts." Again, that case dealt with a "married woman" only, and not with a "feme sole."

KEKEWICH J. It seems to me that I cannot reject this claim without saying that the Matrimonial Causes Act, 1857, does not mean what it says. The 21st section of the Act says: "If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

Then, passing over for the moment s. 25, I turn to s. 26, which says: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant."

(1) (1883) 23 Ch. D. 267, 276.

(2) [1893] 2 Q. B. 85.

(3) 39 Ch. D. 482.

It is said that here we are not dealing with contract, but with property; and the case of *Hill v. Cooper* (1) is referred to, which has decided that a married woman who has obtained a protection order is still a married woman; and if you once find that is so, then, as regards any property she is possessed of as her separate estate subject to a restraint on anticipation, that restraint still holds good if the property comes to her before the desertion or the protection order. The present case, however, falls under s. 25, which says: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her." Those are words of futurity. *Hill v. Cooper* (1), therefore, so far as I am at present concerned, does not deal with the question before me. I am not dealing with property: I am dealing with contract; and ss. 26 and 21 say that where a married woman obtains a protection order, she is, so long as the order continues, to be considered as a feme sole for the purposes of contract; and it appears to me to follow from that that she is in a position to enter into a contract in the same way as a man—that is to say, independently of and freed from the restraint usually imposed on married women for their own protection. Here the married woman did in point of fact enter into this contract of March 6, 1880, and I treat this lady as being a married woman at that time under the protection order. If her husband was dead and she had married again and was the wife of Hughes as described in her will, then the case comes under a different statute; but I am deciding this case only on the effect of the protection order.

That being so, I do not refer further to *In re Ann*. (2) That case was, no doubt, one of some peculiarity, and it may be that the application of the decision in *Palliser v. Gurney* (3) to the Married Women's Property Act, 1882, might be questioned; but, so far as I am aware, my decision in *In re Ann* (2) has not been questioned now for four years; and, therefore, if it were

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applicable to the present case, I should simply follow it, and leave it to a higher Court to say if I am wrong. But I rely on s. 26 of the Matrimonial Causes Act, 1857. Counsel says there is no authority upon that section, and I have been unable myself to find any. In my opinion, therefore, the better plan is to treat the Act as meaning precisely what it says; that is to say, that as to contracts, a married woman, while under a protection order, is to be regarded as a feme sole.

Now, the date of the protection order here is February 9, 1880, that is, before the date of this deed. At the date of the deed Mrs. Walker was a married woman, but she was under the protection order, and was therefore entitled, as I hold, to enter into this contract. It follows that, having afterwards executed her general power of appointment, Mrs. Walker was a feme sole so as to make the property she appointed liable for her debts and liabilities or engagements, and that this deed of 1880 operated as an engagement for which her estate can be rendered liable now. Notwithstanding certain inaccuracies of expression, an order dealing with the engagements of a married woman always treats them as "debts or liabilities." Accordingly, the applicant here is entitled to come in under this administration action to prove his debt; but it would be wrong to part with this claim without deciding the question of the principle on which he is to prove.

[His Lordship then dealt with the construction of the security of March 6, 1880, and expressed the opinion that it covered all sums (if any) due from the testatrix not exceeding the total sum of 800*l.*, with interest on all such sums. With that expression of opinion his Lordship remitted the summons to chambers, in order that the applicant might prove his claim, and declined to deal with the question of costs at present.]

The operative part of the order was drawn up in the following form :—

"And this Court, being of opinion that the fund appointed by the will of the above-named A. A. Hughes is assets for payment of the debts of the said testatrix, including the amount (if any) due under the said indenture of March 6, 1880, and that upon the true construction of that deed the covenants

extend to all sums (if any) due from the said testatrix not exceeding the sum of 800*l.*, with interest on all such sums, doth order that the said application be referred back to chambers for the applicant to prove his said claim."

The plaintiff, the executor, appealed. The appeal was heard on March 18, 1898.

Swinfen Eady, Q.C., and *J. Tanner*, for the plaintiff, appellant, urged the same arguments as in the Court below.

Warrington, Q.C., and *Dauney*, for the respondent, *Keays*, were not called upon.

LINDLEY M.R. The first question is whether the funds appointed by this testatrix are assets for the payment of the debt which she had covenanted to pay. Now with regard to that I think the learned judge below was right, because, when you bear in mind that she obtained a protection order on February 9, 1880, and therefore became, under ss. 25 and 26 of the Matrimonial Causes Act, 1857, a feme sole with regard to property, and capable of contracting debts and obligations, the case is taken completely out of the decision of *In re Roper* (1), before Kay J., the ratio decidendi of which was that the married woman was not capable of contracting debts and obligations within the Married Women's Property Act, 1882. In the present case Mrs. Walker, being capable of contracting debts and obligations, did enter into a contract, but she did so before the Act of 1882 came into force. Turning to that Act we find that s. 4 runs thus: "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." If the married woman had any debts and liabilities at the date when the Act came into operation and when she made the appointment, why should not the section apply so as to make the property appointed assets for her debts and liabilities? We should be putting too narrow a construction on the section if we were to adopt that put forward

(1) 39 Ch. D. 482.

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by counsel for the appellant and say that the section does not apply to debts and obligations for which the married woman was already liable when the Act came into operation. It appears to me to be obvious that the intention of s. 4 was to make property over which a married woman had a general power of appointment by will liable for any debts which she might have contracted.

[His Lordship then dealt with the question of the construction of the security of March 6, 1880, and held that Kekewich J. had arrived at a correct conclusion on that question. His Lordship then proceeded:—] I am therefore of opinion that the learned judge was right on both points, and that the appeal should be dismissed with costs.

RIGBY L.J. I have nothing to add.

VAUGHAN WILLIAMS L.J. Neither have I.

Solicitors for appellant: *G. S. & H. Brandon.*

Solicitor for respondent: *J. C. Stogdon.*

G. I. F. C.

MANCHESTER BREWERY COMPANY, LIMITED
 v. NORTH CHESHIRE AND MANCHESTER
 BREWERY COMPANY, LIMITED.

C. A.

1898

April 20.

[1897 M. 2829.]

(London) [1897 M. 3121.]

Company—Similarity of Name—Deception.

In 1897 two companies existed called the Manchester Brewery Company and the North Cheshire Brewery Company. The former had its brewery in Manchester and had a large business there. The latter had its brewery in Macclesfield and had its business chiefly in Macclesfield, but to some small extent also in Manchester. In that year the business of the latter company was sold to persons who started a new company named "The North Cheshire and Manchester Brewery Company":—

Held (reversing the decision of Byrne J.), that though it did not appear that there was any fraudulent intention, they must be restrained from trading under that name, as it was calculated to deceive the public into thinking that the new company was carrying on the business of the Manchester Brewery Company.

There is no rule that a name is not so like another as to be calculated to deceive when the words common to the two names come first in the one and last in the other.

THIS was an appeal by the plaintiff company from an order of Byrne J. dismissing their action.

The plaintiff company were incorporated as "The Manchester Brewery Company, Limited," on June 7, 1888. Their business was the continuation of an older business; their brewery was in Manchester, and they had a large business in and about Manchester.

There was at that time in existence a company called "The North Cheshire Brewery, Limited," whose brewery was at Macclesfield. They carried on business in Macclesfield and other large towns, and at one time had a good business in Manchester, but it had fallen off. The company sold their business to a Mr. Rhodes, who determined to get up a company for the purpose of carrying on the old business and adding to it. He suggested that the name of the new company should be "The North Cheshire and Manchester Brewery Company,

C. A. Limited." The proposed directors assented to this, and the
1898 company was registered by that name in October, 1897. Mr.
MANCHESTER Rhoades, who was one of the directors, deposed that in sug-
BREWERY gesting that name he had no thought of the Manchester
COMPANY, Brewery Company, and did not even know of its existence; and
LIMITED the other directors, all of whom were resident in Halifax, also
v. deposed that they had never heard of it, except a Mr. Brown,
NORTH who was too ill to attend to be examined. The company had
CHESHIRE AND a few licensed houses in Manchester, and Mr. Rhoades deposed
MANCHESTER that they had the intention of purchasing more public-houses
BREWERY there.
COMPANY,
LIMITED.

Shortly after the registration of the new company the Manchester Brewery Company commenced an action against it for an injunction to restrain the defendant company, its agents and servants, from using or carrying on business under its present name, style, or title, or any style or name which included the plaintiff company's name, or so nearly resembled the same as to be calculated to deceive the public, or to induce the belief that the business carried on by the defendant company was the same as the business carried on by the plaintiff company, or in any way connected therewith.

The plaintiff company moved for an injunction in the above terms. No injunction was granted, but an order was made for expediting the trial, the costs of the motion being made costs in the action; and the action came on for trial before Byrne J.

There was evidence that some people when they first saw the prospectus of the new company, and before they read it, thought from the title that the Manchester Brewery Company was being amalgamated with another company, but were undeceived on reading it, and the evidence negatived the view that any one had taken shares under the impression that he was taking shares in a company with which the plaintiff company had anything to do. There was no evidence that any customer had bought beer of the defendant company under the impression that it was beer made by the plaintiff company.

Byrne J. thought that the introduction of the word "Manchester" into the name of the defendant company, though it made the latter part of the title of the defendant company in

words the same as that of the plaintiff company, was not at all likely to deceive. That it was of the gravest importance to consider what was the catchword—what was the short name which people would use. Surely the first. The case would have assumed an entirely different aspect if the defendants had called themselves “The Manchester and North Cheshire Brewery Company, Limited.” As the name stood, a man wishing for ale of the defendant company would not ask for Manchester ale, but North Cheshire ale. That if the name of the defendant company was fraudulently used, the effect of “Manchester” being there might cause deception, but the public could not be deceived by the use of the name fairly and in the ordinary course of trade. His Lordship did not think that persons who saw the full name of the defendant company posted up behind a bar would be likely to think that they should get there their favourite ale made by the plaintiff company. His Lordship accordingly on November 30, 1897, dismissed the action.

The plaintiff company appealed.

Moulton, Q.C., Astbury, Q.C., and Clare, for the appeal. The name adopted by the defendant company is calculated to deceive, for it suggests the idea that the Manchester Brewery Company has been incorporated with another company, and persons who had been in the habit of buying beer of the plaintiff company by retail would suppose, if they saw beer of the defendant company advertised under its full name, that the plaintiff company had amalgamated with another company, and that they should get the beer they were used to. The defendant company ought to have some good reason for introducing a name which may cause confusion, and they have none. They have no brewery in Manchester, and only some small licensed houses there. There are cases where a person who has been carrying on business in his own name cannot be prevented from making in the trade name a slight variation which correctly represents a change of circumstances, though it makes it more likely to be mistaken for the name of another firm in which the same name occurs, as *Turton v. Turton* (1); but where a man uses

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(1) (1889) 42 Ch. D. 128.

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his own name to start a new business to be carried on by a company under that name, the proceeding will be restrained on the ground that the new business may be confused with an old business in the title of which the same name occurs: *Tussaud v. Tussaud*. (1)

[LINDLEY M.R. Is there any case where a company has incorporated in its name the whole name of an old company?]

There does not appear to be any such case; but the fact of the defendant company having done so makes the case of the plaintiff company the stronger. The defendant company in the Court below relied on three cases. The first was the *Colonial Life Assurance Co. v. Home and Colonial Assurance Co.* (2) That, as the judge said, was an attempt to claim a monopoly of the word "Colonial." That one company would be mistaken for the other was unlikely, and the case does not appear to have been put on the ground of similarity. In *Saunders v. Sun Life Assurance Company of Canada* (3) the Sun Life Assurance of Canada, which was incorporated in Canada, set up a branch here, and it was held that they could not be restrained, but that they could not omit the words "of Canada." This shews the distinction between using an old name and starting a new one. The present case is governed by *Hendriks v. Montagu*. (4) The second case relied on by the defendants was *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Society*. (5) The names were very different; yet the judge, though he refused an injunction, thought that there was a substantial question to be tried. In *Accident Insurance Co. v. Accident, Disease, and General Insurance Corporation* (6), an injunction was granted; but on appeal the case was compromised on the terms of the defendant company removing the word "Accident" from the first place in their name. (7) The third case relied on by the defendants was the *London Assurance v. London and Westminster Assurance Corporation* (8), where it was held that

(1) (1890) 44 Ch. D. 678.

(2) (1864) 33 Beav. 548.

(3) [1894] 1 Ch. 537.

(4) (1881) 17 Ch. D. 638.

(5) (1847) 17 L. J. (Ch.) 37.

(6) (1884) 54 L. J. (Ch.) 104.

(7) W. N. (1884) 191.

(8) (1863) 32 L. J. (Ch.) 664.

there was not sufficient similarity to entitle the plaintiffs to an injunction. In that case there was no such tendency to mislead as in the present. In *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co.* (1) an injunction was granted.

[RIGBY L.J. referred to *Merchant Banking Company of London v. Merchants' Joint Stock Bank.* (2)]

Cozens-Hardy, Q.C., and *Stewart-Smith*, for the respondents. We admit that the plaintiffs need not shew any intention to deceive: it is enough if the name of the defendant company is one likely to cause deception. But is there here any such tendency? The *Accident Company's Case* (3), referred to by the appellants, shews strongly what a difference it makes whether the part of the name common to the two companies is the first part of the name. This was dwelt upon by Byrne J., and, as he says, the defendants' beer would be known as "North Cheshire beer," and there could be no mistake.

[RIGBY L.J. I doubt whether his Lordship did not lay too much stress on the point whether the part of a company's name which another company borrows comes first or second. The stress may fall on the second part, and you do not meet the argument that the name suggests an amalgamation.]

The evidence shews that no person applying for shares was misled.

[RIGBY L.J. No, because he had in his hands a prospectus which shewed him the truth.]

No doubt, if the full name of the defendant company is calculated to deceive it cannot be used; but it is difficult to see that it can deceive the trade, and the public will chiefly be led by the natural abbreviations of the names, and no abbreviations of them are likely to be mistaken for each other.

LINDLEY M.R. We are all agreed that we cannot take the same view as the learned judge in the Court below. The case is a peculiar one, and, before referring to the facts, I turn to the 20th section of the Companies Act, 1862 (25 & 26 Vict.

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(1) (1880) 50 L. J. (Ch.) 253.

(2) (1878) 9 Ch. D. 560.

(3) 54 L. J. (Ch.) 104.

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c. 89), which runs thus: "No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except"—I need not read the exception, because it only applies to a state of things which does not exist here.

The short outline of the facts is this: On October 11, 1897, there were two brewery companies in the North of England registered as limited companies. One was the North Cheshire Brewery Company, Limited, which carried on business mainly at Macclesfield, where its brewery was. There was another limited company called the Manchester Brewery Company, the brewery of which was in Manchester. Manchester and Macclesfield are not very far apart, and there may, of course, have been competition in trade between the two companies, though the directors of the defendant company say they had never heard of the Manchester Brewery Company.

That was the state of things on October 11, 1897. On that date a syndicate which had obtained an agreement for the purchase of the business of the North Cheshire Company registered a new company with the consent of the North Cheshire Company under the name of the North Cheshire and Manchester Brewery Company, Limited. Now, first of all, what right had they to do that? The peculiarity of the case is that, without consulting the Manchester Brewery Company, and without any intimation to it, they in fact take the whole of the name of the Manchester Brewery Company. They do not come within the first words of s. 20, for it is impossible to say that the full name of the North Cheshire and Manchester Brewery Company, Limited, is identical with the name of the Manchester Brewery Company, Limited, although they have taken the whole of the plaintiff company's name. But what does the title "The North Cheshire and Manchester Brewery Company, Limited," denote? What is the *primâ facie* meaning of it to anybody who knows the fact that there were two companies, one in Manchester and one in Macclesfield, carrying on business under the names which I have mentioned? The name suggests to any business man who knows anything at all

about the formation and amalgamation of companies that the two companies are amalgamated. If that is true, can it be said that the defendant company do not fall within the second part of the 20th section, which says that no company shall be registered under a name so nearly resembling the name of a subsisting company as to be calculated to deceive? It appears to me they are actually hit by those words. If you find any company not merely taking part of the name of a subsisting company, like the word "Manchester," but taking the whole of the name of a subsisting company and combining it with the whole of the name of another subsisting company, the inference is that there has been an amalgamation of the two companies, and tends to deceive the public into the supposition that the business of each of the old companies is being carried on by the new company. Byrne J. addressed his mind to the argument that the name suggested an amalgamation of these two companies, and he felt a difficulty about it, and, as I understand it, he has come to the conclusion he did on the ground that there was no passing off of the beer made by the defendant company as the beer of the plaintiff company. That is one method of deceiving. But another method which is just as likely to deceive as not is this—that if you are carrying on business under the name of the North Cheshire and Manchester Brewery Company, Limited, you are stating that you are carrying on the business of the Manchester Brewery Company, Limited, and that persons cannot get the beer of that company except by coming to the company with the larger name; in other words, you are representing that the Manchester Company has ceased to carry on business as a separate company. To my mind that is calculated to deceive a great mass of people. Of course, persons applying for shares on the faith of a prospectus see at once when they read the prospectus that what is indicated by the larger name is not true—that there is no such amalgamation as that which the name alone suggests. But how stands the case as regards people who never see the prospectus—for instance, as regards a person who sees the name "North Cheshire and Manchester Brewery Company, Limited," over a public-house? Suppose he knows that there was a

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North Cheshire Brewery Company and a Manchester Brewery Company, his idea would be that those two companies had combined together, and that the Manchester Brewery Company had ceased to carry on business as a separate company. I think there is no answer to this.

It is true that in consequence of the dates, that is to say, the defendant company having started only on October 11, 1897, and the writ being issued on October 22, 1897, and the trial coming on soon after, there is no evidence of actual deception; but there is a good deal of evidence to shew that not fools, not people who know nothing about such matters, but business people, would infer from the name of the defendant company that the Manchester Brewery Company's business was being carried on by the defendant company. The use of the defendant company's name is, therefore, calculated to deceive.

I think, therefore, that this appeal ought to be allowed, and that there ought to be an injunction in substantially the terms asked for by the claim. I do not wish to say anything calculated to lead to the supposition that the plaintiffs have a monopoly in the word "Manchester," but I do go the length of saying that a company which takes the whole of the name of another subsisting company, and uses it in such a connection as this defendant company has used it, does what is calculated to deceive. I do not go into the question whether they intended to do it or not: I only say that this particular combination of names as they have got it is not justified by law; and I go so far as to say I do not think it is justified by fair dealing.

RIGBY L.J. I am of the same opinion. I also refrain from going into the question whether any intentional wrong was done here, though I cannot help seeing that there must have been a great deal of wilful blindness on the part of the directors of the new company. It seems to me a strange thing that a board of intending directors who are acting in getting up a company should not take the trouble to make a single inquiry, and not even suggest amongst themselves a question as to whether there might not be another company with whose

business they might possibly interfere. I will assume, however, for the purpose of my judgment, that they had no intention of doing what they knew to be wrong, and will treat the case with reference to that question as it was treated by the learned judge in the Court below.

It seems to me that where you have two companies carrying on business in districts which overlap each other, one called the North Cheshire Brewery Company, Limited, and the other called the Manchester Brewery Company, Limited, and there appears in the field a new company calling itself the North Cheshire and Manchester Brewery Company, Limited, the assumption of that title would be understood by many people (I do not say by all) to mean that the two companies that formerly existed have become one and the same company, with the effect that the persons who arrive at that conclusion would suppose that the beer supplied by that new company was really beer which they had known of either as the North Cheshire Brewery Company's or the Manchester Brewery Company's ale, or, in other words—and perhaps this is the more precise way of stating it—that the business being carried on under that title comprehends not only the business which formerly was carried on by the North Cheshire Company, but that carried on by the Manchester Brewery Company, Limited. We know perfectly well that within recent times (though at the date of some of the decisions that have been referred to it might not have been the case) this method of combining two businesses and then of indicating the combination by taking the two titles and making them into one composite title, comprising the names of the two combined companies, has become perfectly common in all parts of the country. This has taken place in numerous cases of banking companies in London who have joined their businesses and set up one firm or incorporated name containing the elements of the title of the combined companies. Whether by misfortune or not, it appears to me that the defendant company have fallen into an error: they have taken the title of the North Cheshire and Manchester Brewery Company, Limited, so that in substance they have taken the identical title of the plaintiff company, and added to that the

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words "North Cheshire and." I do not see any justification for that, knowing as we do the common practice of indicating by that kind of title the combination of two companies in the carrying on of their business.

I do not think it is important to go fully into the evidence. The case does not require much evidence, and I must say that when the title was read out I at once thought that there must have been an amalgamation of two companies, and that the action must be a dispute between one of the amalgamated companies and the company formed by the amalgamation, as to the terms of the amalgamation. I was surprised when I found that there was no connection between the plaintiff and defendant companies, because the very name seemed to be almost conclusive of a connection, and I looked for any explanation that could be given by the defendant company of the fact that they had got into their title the exact title of the plaintiff company. We have evidence for what it is worth to this effect—that half-a-dozen witnesses on seeing the title jumped to the conclusion, and not an unreasonable conclusion, that the companies were connected, and that the first company was in some way swallowed up by the second. True it is that such of them as read the prospectus found out, coupling it with the knowledge they had, that there was no such combination, and in fact no connection at all; but it is not the less true that they arrived at that conclusion, until they found in the prospectus something to shew them that it was not correct. If that took place with regard to the witnesses, who were not apparently below the average level of intelligence, why should not a man who sees over a public-house door or in an advertisement "The North Cheshire and Manchester Brewery Company, Limited," giving perhaps addresses where the beer can be got, come to the same conclusion, and why should it be unreasonable for him to do so? As far as I am able to deal with such a matter, and with such evidence as we have, I think the conclusion is a natural and a reasonable one, and I do not think it necessary for the plaintiffs to prove what, under the circumstances of this case, it would be almost impossible to prove, even if it were true, that any one had gone

and asked for the defendants' beer believing it to be the beer of the plaintiff company. As far as we can make out, they have not offered their beer as the beer of the plaintiff company. They themselves say that almost immediately after their incorporation this question arose, and until it was settled they preferred to carry on the business under the name of the North Cheshire Brewery Company, Limited, and under that name only. This made it practically impossible that the question should be put to the test; and I think it is fair to treat the question as if it had arisen before the new company had sold a single glass of beer, or, indeed, before it was incorporated; and it appears to me that if this case had been brought here before the incorporation of the company, and so before it was possible to prove any actual deception, the same conclusion would have been arrived at.

I wish to guard myself against being supposed to say that there was any monopoly in the word "Manchester." If that word had been used in such a way that people could not be deceived by it, the conclusion would have been totally different.

Again, I must protest against dealing with these cases on the principle that the first word is the important word. The first word may in some cases be the important one, but in other cases it may be the least important. I attach much more importance to the word "Manchester" used here in connection with the rest of the words that make up the title of the plaintiffs than I should have done if it had been in any different position. "The Manchester Brewery Company, Limited," is to be read here by any one who glances at the title; and if he is acquainted with the title of the plaintiff company, I think he would naturally arrive at the conclusion that this new company was connected with, and indeed carrying on, the business of the old company.

COLLINS L.J. I am of the same opinion upon the question of fact, and I do not think it necessary to add anything to the reasons already given.

Solicitors: *Chester & Co., for Farrar & Co., Manchester; Firth & Co., for Godfrey Rhodes & Evans, Halifax.*

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[1894 R. 1864.]

April 25, 26,
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The Court of Appeal in 1896 declared B. to have purchased certain Ceylon estates as a trustee for R., subject to B.'s lien for the purchase-money and other advances for the purposes of the estates, and an account was directed of all sums of money received by B. in respect of any sale, mortgage, or other disposition of the estates or any of them. In July, 1876, B., who had previously obtained from C. & Co. two advances of 20,000*l.* and 25,000*l.* on the security of his own estates in Cumberland, had obtained from them 20,000*l.* more, and signed this memorandum: "Messrs. C. & Co.,—You have now advanced to me 20,000*l.*, 25,000*l.*, and 20,000*l.* on security of my Cumberland estates. If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates." In July, 1879, by a memorandum indorsed on this memorandum, B. stated to C. & Co. that he had directed his agent to execute to them, in pursuance of the former memorandum, a formal charge on the D. and D. estates (two of the estates to which R. afterwards established his title) for 35,000*l.*, the balance then due from him to C. & Co. A mortgage in Ceylon was executed accordingly. C. & Co. never resorted to the D. and D. estates. The official referee in taking the accounts charged B. with 20,000*l.* as money received by him in respect of a mortgage on part of the trust estate. Kekewich J. struck out this sum altogether:—

Held, on appeal, that as B. had received 20,000*l.* on a charge on the Cumberland estates, and a promise to give a charge on the D. and D. estates, which promise was afterwards followed by an actual charge, he must be treated as having raised that sum rateably out of the Cumberland estates and the D. and D. estates according to their respective values after deducting the prior incumbrances upon them, and must be debited with the share attributable to the D. and D. estates.

THIS was an appeal from a decision of Kekewich J. on an application to vary the report of the official referee.

By a judgment of the Court of Appeal dated December 12, 1896 (1), the Court declared that the defendant purchased the estates in question in the cause known as "the Delmar Estates," in Ceylon as a trustee for the plaintiff, subject to his lien for the moneys advanced by him for such purchase, and for all

sums advanced by him to or on behalf of the plaintiff, and for all proper advances, disbursements, and outlay for improvements or otherwise in relation to the cultivation, management, and upkeep of the estates or any of them, and for his costs, charges, and expenses properly incurred in connection with the said purchase, and generally in relation to the estates or any of them during such time as the estates were in the possession or under the control and management of the defendant as trustee for the plaintiff, with interest for the same respectively at the rate of 6*l.* per cent. per annum, and for his commission upon all transactions in connection with the sale of the crops and produce of the estates or any of them, and upon his disbursements in relation thereto; and it was referred to the official referee to inquire and report upon the result of—

(1.) “An account of all sums of money received by the defendant or by any other person or persons by his order or for his use in respect of any sale, mortgage, or other disposition of the said estates or any of them, from the date of the said purchase to the date or dates when the defendant sold or parted with the possession of, or otherwise disposed of, or ceased to have the management of or control of, the said estates or any of them, or any part thereof.”

An account was also directed of all sums received by the defendant in respect of rents and profits, or the proceeds of sale of crops, and an account of all moneys advanced by the defendant for the purchase, and of the other items for which he was stated above to have a lien; and it was directed that the balance due to or from the defendant on the balance of all the accounts taken together should be stated. Further consideration was reserved.

The estates had been conveyed to the defendant as purchaser in his own name on May 27, 1873, and he was entered on the register as owner. Among the estates were estates known respectively as “Delmar,” “Alnwick,” and “Delta.”

Prior to July, 1876, the defendant had borrowed from Messrs. Coutts & Co. two sums of 20,000*l.* and 25,000*l.* on the security of estates belonging to him in Cumberland. In July, 1876, being pressed for money, he wished to borrow from them 20,000*l.*

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more. They advanced him that sum, and their agent handed to him for signature the following letter, written upon paper on which was printed "59, Strand," the address of the bank:—

"July 17, 1876. Messrs. Coutts & Co.,—You have now advanced to me 20,000*l.*, 25,000*l.*, and 20,000*l.* on security of my Cumberland estates. If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates."

The defendant signed this letter, and he afterwards being in difficulties, Messrs. Coutts & Co. required the further security to be given; and on July 21, 1879, the defendant signed the following letter, indorsed on that of July 17, 1876:—

"July 21, 1879. Messrs. Coutts & Co.,—With reference to the annexed memorandum, I have this day telegraphed instructions to my agent, Mr. George Hedges, to execute and register a formal charge in favour of Hugh Lindsay Antrobus, Esq., and the Hon. Henry Dudley Ryder, upon my Delta and Delmar estates for 35,000*l.*, which charge you will hold by way of further security for the various advances you have made to my firm of Price, Boustead & Co."

Hedges accordingly, as attorney for the defendant, executed and gave to Antrobus and Ryder, as representing Coutts & Co., a deed dated July 24, 1879, by which the defendant acknowledged that they had lent to him 35,000*l.*, and mortgaged to them in the form used in Ceylon the Delmar and Delta estates to secure that sum with interest. This deed was duly perfected and registered according to Ceylon laws.

The 35,000*l.* appeared to be the balance due from the defendant to Coutts & Co. in July, 1879, the sums amounting to 65,000*l.* mentioned in the letter of July, 1876, having been partly repaid.

Coutts & Co. never resorted to the Ceylon estates for what was due to them.

In taking the account directed as above, the plaintiff sought to charge the defendant with 35,000*l.* as received by him on account of a mortgage of part of the Delmar estates. The official referee did not allow this claim in full, but held that the sum of 20,000*l.* advanced in July, 1876, was money raised by

mortgage of part of the trust estate, and debited the defendant with it. The defendant moved to vary the report as to this and some other items. Kekewich J. considered that, though the charge on the Delmar and Delta estates was a breach of trust, it was one by which the plaintiff had suffered no loss, and from which the defendant had received no benefit in 1879, and was not proved to have received any in 1876. His Lordship considered the case to be closely analogous to *Shaw v. Foster* (1), and altogether disallowed the charge of 20,000*l.* against the defendant. He also struck out a sum of 13,203*l.* with which the official referee had charged the defendant as received by him from a sale of the Alnwick estate. The plaintiff appealed from this decision. The question as to the 13,203*l.* does not appear to call for a report.

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Haldane, Q.C., and *Gilmour*, for the appellant. The defendant could not have got the last loan of 20,000*l.* without the Ceylon estates, and, though the bankers never resorted to those estates for repayment, the defendant must be considered to have raised money upon them. The value of the equity of redemption in the Cumberland estates in 1876 was small compared with the value of the equity of redemption in the Delmar and Delta estates, and it would be impossible now to compare the values accurately. The loan ought, therefore, now to be treated as obtained on the Delta and Delmar estates only. If the principle that the money ought to be treated as raised rateably out of the Cumberland and Ceylon estates in proportion to their values be the right one, then, so far as the materials before the Court enable us to judge, the proportion to be treated as raised out of the Ceylon estates would be about three-fourths.

George Lawrence, for the defendant. No doubt the defendant committed a breach of trust as to the Delmar and Delta estates, and if a trustee gets any benefit from a dealing with the trust property he must account for it; but here the defendant received no benefit. The execution of the legal charge in 1879 gave no benefit to him, for all the money advanced had

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been advanced years before; and in 1876 the money was advanced, not upon the Ceylon estates, but on the Cumberland estates, with a promise to execute a charge on the Ceylon estates if required; and these estates were never resorted to for the loan. It cannot, therefore, be said that the 20,000*l.* was wholly or in part received by the defendant out of the Ceylon estates.

Haldane, Q.C., in reply.

LINDLEY M.R. We have to consider in this case whether Kekewich J. was right in striking two sums of 13,203*l.* and 20,000*l.* out of the amounts which have been found due from the defendant to the plaintiff by the official referee in taking certain accounts directed by order of this Court. It is important to attend to the terms of that order, as it forms the starting-point from which the official referee had to proceed. The dispute between the plaintiff and the defendant was, shortly, whether the defendant was a trustee for the plaintiff of certain coffee plantations in Ceylon which were known generally as the Delmar estates, and this Court declared that the defendant, who said he had purchased those estates for himself, purchased them as trustee for the plaintiff, subject to his lien for certain moneys advanced by him for the purchase, and for the sums advanced by him for carrying on the estates. Then this account was directed—

[His Lordship read the direction for an account, and then disposed of the question as to the 13,203*l.* arising from the sale of Alnwick, and then proceeded to the other item.]

The official referee has charged the defendant with 20,000*l.* upon the ground that he has received it in respect of a mortgage of the estates called Delmar and Delta, and the question is whether the defendant did or did not receive this 20,000*l.* in respect of a mortgage of those estates. Kekewich J. has differed from the official referee upon that point, and has come to the conclusion that the defendant did not receive 20,000*l.* or any part of it in respect of any mortgage of these estates.

The facts are these. It appears that the defendant, who carried on a large business, and at one time, I suppose, was a flourishing man though he afterwards failed, had large advances

from Coutts & Co. He had valuable estates in Cumberland, and before July, 1876, he had borrowed from Coutts & Co. 20,000*l.* and 25,000*l.* on two equitable mortgages of those estates. In July, 1876, he wanted another 20,000*l.* He went to Coutts & Co. to borrow it, and Coutts & Co. agreed to lend it. The gentleman at Coutts & Co. who managed this transaction was a gentleman named Logan, who is dead, and we do not know what he would say about it; but what we do know is this, that Mr. Logan drew up upon a piece of note-paper on which was printed "59, Strand," which shews it was a piece of paper belonging to the bank, and got the defendant to sign this letter: "Messrs. Coutts & Co.,—You have now advanced to me the several sums of 20,000*l.*, 25,000*l.* and 20,000*l.* on security of my Cumberland estates." Of those three sums the first 20,000*l.* and 25,000*l.* were past transactions; the present transaction was the further advance of 20,000*l.* Then comes this: "If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates." That is signed by the defendant. The first question which arises is, What is the true construction of that document, and what is the true inference to be drawn from it? Is it true that the 20,000*l.* received by the defendant from Coutts & Co. was raised on the security of the Ceylon estates, or that any portion of it was so raised, and if so, how much? Now it seems tolerably plain, I think, that the advance was made on the security of the Cumberland estates with the promise of an additional security if required. By the law of Ceylon this did not amount to an equitable charge on the property: it amounted to a promise which could be enforced and which the defendant could be compelled to fulfil by giving a legal charge, which he ultimately did. But the first question is, What is meant by "If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates"? A valid charge for how much? One possible view is, considering what is stated, that the bankers had advanced the three sums on the Cumberland estates, that this was to be a valid charge only for the deficiency if the Cumberland estates should not be sufficient. That is a possible construction; but that

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construction, I think, is negatived by the ordinary course of business. We know perfectly well that bankers who stipulate for securities like these intend to charge the whole of their advances upon all of their securities. I never heard of a banker's charge which did not, unless it was very specially drawn; and the language here, "I undertake by way of further security to execute to you a valid charge on my Ceylon estates," must, I think, in fairness, and having regard to the ordinary habits of mankind and business habits, be read as a promise to give a valid charge on the Ceylon property for the whole of these sums, and not only for such part of them as should be unpaid after realizing the Cumberland estates.

But it cannot be said, I think, in fairness, that this 20,000*l.* was raised only on the security of the Ceylon estates. It was really raised upon the security of the Cumberland estates, and the promise to execute a valid charge on the Ceylon estates. Nothing further was done apparently for about three years. There is no dispute that Mr. Boustead had that 20,000*l.*; but Coutts & Co. were satisfied with the equitable mortgage they had got on the Cumberland estates, and they did not in fact ask for any further charge on the Ceylon estates. But Mr. Boustead, having got into difficulties in the summer of 1879, appears from his own statements to have informed the bankers of it; and on that date Mr. Logan, who was then alive, seems to have had an interview with Mr. Boustead, and to have written out and got Mr. Boustead to sign a memorandum written on the back of the letter of July, 1876: "With reference to the annexed memorandum" (i.e. the letter of July 17, 1876), "I have this day telegraphed instructions to my agent, Mr. G. Hedges, to execute and register" (which was necessary by the law of Ceylon) "a formal charge in favour of H. L. Antrobus, Esq., and the Hon. H. D. Ryder, upon my Delta and Delmar estates for 35,000*l.*, which charge you will hold by way of further security for the various advances you have made to my firm." The estates which he called "my Delta and Delmar estates" are two of the estates which the Court has decided to belong to the plaintiff. The 35,000*l.* appears to have been the balance then due to Coutts & Co. or thereabouts, and it included the 20,000*l.*

which was advanced in July, 1876. Therefore, the defendant did, pursuant to his promise of July 17, 1876, give to Coutts & Co. a mortgage (I will call it for 20,000*l.*—there is no question about the other 15,000*l.*) upon his Delmar estates. But it does not follow that he got the whole of this 20,000*l.* on the Delta and Delmar estates. He did not, for the 20,000*l.* was not advanced on the security of the Ceylon estates alone, but on those estates plus the Cumberland estates. What is the consequence of this? The official referee has held that the defendant is liable for the whole 20,000*l.*, inasmuch as the whole 20,000*l.* is charged upon the Delta and Delmar estates. It is true that it is charged upon them, but it is not true that that sum was raised upon them without the Cumberland property. Kekewich J. has taken the view that no part of the 20,000*l.* was raised on the Delmar and Delta estates. I cannot, I confess, take that view, for it appears to ignore the real transaction which took place on July 17, 1876, when the 20,000*l.* was advanced. Mr. Lawrence has argued ingeniously that this sum was only advanced on a promise and not on the estates; but when you come to see that the promise was performed, it appears to me that that is making a distinction without a difference. The sum was advanced upon a promise to give a mortgage, and the mortgage was given. To say that that sum was not advanced upon the mortgage seems to me impossible. I think, therefore, that the learned judge has gone too far in striking out the whole 20,000*l.*, and the learned referee has gone too far in charging the defendant with the whole of that sum. I think the proper view of the case is that the 20,000*l.* was advanced upon the Cumberland estates and the Delmar and Delta estates in proportion to their respective values. Therefore, in my opinion, the decision of Kekewich J. must be reversed, but the learned official referee's report as to this particular sum must be modified.

Ought we, then, to direct an inquiry about the values, or have we sufficient materials to do justice between the parties in fixing the proportion ourselves? I think we have the materials to do justice between them. Mr. Haldane has made out substantially, I do not say accurately, that the proportion (bearing in mind the incumbrances on the Cumberland estates

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and the incumbrances on the Ceylon estates), would be about three to one—that is to say, that the equity of redemption of the Delta and Delmar estates were at the time worth about three times as much as the equity of redemption in the Cumberlandland estates. That is the result as near as anybody could now get at it, considering that the transaction took place more than twenty years ago. The result is to reduce the official referee's figures in respect of this 20,000*l.* and interest by one-fourth. Subject to this alteration, the appeal must be allowed, and the defendant must pay the costs.

RIGBY L.J. The decree of this Court made in December, 1896, established that the defendant Boustead was a trustee for the plaintiff of certain estates in Ceylon, Delmar, Alnwick, and Delta, and others with which we are not now concerned. They were all called generally the Delmar estates. The decree directed an account of moneys received by the defendant in respect of any sale, mortgage, or disposition of any of these estates. The account was not to be taken on the footing of wilful default, but, according to the admissions as they then stood in the evidence, that was a matter which did not much concern the plaintiff.

The two items which we have to deal with now rest upon entirely different bases. I do not even see that either of them is affected by a side-light from the other. [His Lordship then proceeded to deal with the item of 13,203*l.*] I have had more difficulty about the 20,000*l.* It requires a good deal of thinking out before you can feel satisfied that you have got the right explanation in law of what has taken place. We find that when the defendant was in pecuniary straits and apparently on the brink of bankruptcy he executed a mortgage of the Delmar and Delta estates for 35,000*l.*, in the regular form and of undoubted validity, in favour of persons who knew nothing of the claims of the plaintiff, and acknowledged the receipt of 35,000*l.* What can be more clearly a case falling within the account which is directed to be taken? This sum is admitted to have been received in respect of a mortgage of the Delmar and Delta estates. If the defendant says that he is not responsible for the

35,000*l.* or any part of it, it is for him to make it out. Now, what does he say? I leave out stories which are shewn to be unfounded and incorrect. But he does at last bring forward evidence from which I think it is reasonable and right for us to conclude that at the date of that mortgage in 1879 there was no advance, but that three years earlier, in the month of June, 1876, there had been an advance of 20,000*l.* made in the manner indicated by the letter of July 17, 1876. This letter is addressed by the defendant to Coutts & Co., his bankers, and he first notices as a matter of fact that they had already advanced to him several sums: "You have now advanced to me 20,000*l.*, 25,000*l.*, and 20,000*l.* on security of my Cumberland estates." I will pause there. It was shewn that the advance of the first 20,000*l.* and the 25,000*l.* (making 45,000*l.*) had been made some time previously, and that the advance of the second 20,000*l.* was made as part of the transaction which is in part evidenced by this letter of July 17, so that it was a contemporaneous advance. It is true that it is stated to have been an advance on the security of the Cumberland estates, and that the other sums of 20,000*l.* and 25,000*l.* were an advance upon those estates exclusively; but the letter goes on to say: "If required by you at any time, I undertake by way of further security"—further security for what? The letter makes no distinction between the first, the second, and the third sum. It is not further security for the last-mentioned 20,000*l.*; it is further security for the whole, which would be 65,000*l.*—"I undertake by way of further security to execute to you a valid charge on my Ceylon estates." Now it is said, and I suppose accurately, that he had Ceylon estates of his own. It may be so; and if, when he came to execute a real mortgage, he had included only those estates, I do not see what right the plaintiff would have had to them; but the fact is that, in pursuance of this letter, as the defendant himself says, he executed in 1879 a mortgage of the Delmar and Delta estates. There was, therefore, an advance of 20,000*l.* by reason of a promise to add as further security for the whole 65,000*l.* certain Ceylon estates. When we go to the mortgage which is actually executed, we know what they were—the Delmar and the Delta estates, part

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of the plaintiff's estates. Would it then be reasonable to say that he did not receive any money in respect of the mortgage of the Delmar and Delta estates? The learned judge has said that he did not. I do not think that is the true result. But did he, as the official referee has held, receive 20,000*l.* in respect of a mortgage of the Delmar and Delta estates? I do not think that is right. If we are not to say all, and if we are not to say no part, how are we to arrive at what he did receive? The only thing left to us is to say that we must consider the value of the properties which ultimately were charged—the value, that is to say, looking upon them as properties already charged in favour of other people.

[His Lordship then entered into the evidence of the defendant and his witnesses as to the respective values of the Cumberland estates and the Delmar and Delta estates, and came to the result that the margin left for raising money upon them was 21,000*l.* as to the Cumberland estates and 64,000*l.* as to the Delmar and Delta estates.]

We, therefore, give the defendant a slight advantage—just “the turn”—in treating the values as one-fourth and three-fourths: the result being that we conclude as matter of law that three-fourths of the 20,000*l.* were got on the security of the Ceylon estates Delmar and Delta, and one-fourth only on the Cumberland estates. Then all we have got to do is not to direct any further account, but to take off one-fourth, which will include a fourth of the interest and a fourth of the principal, and let the finding against the defendant stand as regards this item of 20,000*l.* at three-fourths of the sum found by the official referee.

COLLINS L.J. I am of the same opinion as to both items, and do not think it necessary to go through the facts for a third time.

Solicitors: *G. H. C. Lea; Hollams, Sons, Coward & Hawksley.*

H. C. J.

LONDON AND NORTH WESTERN RAILWAY COMPANY AND GREAT WESTERN RAILWAY COMPANY *v.* RURAL DISTRICT COUNCIL OF RUNCORN.

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March 30, 31.

[1897 L. 672.]

Local Authority—"Sewer" or "Drain"—*Railway Company*—*Sewer made under Local or Private Act*—*Vesting in Local Authority*—*Railways Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), s. 68—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, 327.

A railway company, whose special Act expressly incorporated the Railways Clauses Consolidation Act, 1845, constructed land drains for the purpose of conveying surface water from lands adjoining the railway, and these land drains were, without the knowledge or consent of the company, used by a rural sanitary authority to convey sewage from certain houses within the district of such authority:—

Held, affirming the judgment of Stirling J. (*ante*, p. 34), that these drains were "sewers" within the meaning of the Public Health Act, 1875, but that they were sewers made and used for the purpose of draining land under a local or private Act of Parliament within the second exception in s. 13 of that Act, and did not vest in the local authority; and consequently that the company were entitled to an injunction to restrain the sanitary authority from so using them.

THIS was an appeal by the defendants, the sanitary authority of Runcorn, from a decision of Stirling J. (1), where the facts of the case and the arguments on both sides are fully reported.

Buckley, Q.C., and *E. P. Hewitt*, for the appellants.

Cripps, Q.C., and *Montague Shearman*, for the respondents, were not called upon to argue.

LINDLEY M.R. I cannot bring myself to doubt that the judgment appealed from is right. That judgment declares that the land drains, ditches, and sewers of the plaintiffs in the locus in quo, as I will call it, are not vested in the defendants, but in the plaintiffs, and grants an injunction to restrain the defendants, who are the rural district council of Runcorn, from connecting their sewers with the drains of the plaintiffs. It

(1) *Ante*, p. 34.

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appears to me that the argument for the appellants entirely fails. If not actually conceded, it is I think plain that the defendants have no right to turn sewage into the drains of the plaintiffs unless those drains are sewers vested in the defendants by virtue of the Public Health Act. That those drains are "sewers" within the definition clause seems to me to be clear. Whether sewage passes into them or not does not seem to be a test. Every "drain" is a sewer, except "drains" which are specially defined to be drains within the interpretation given to the word "drain" in the Act. The drains here in question do not come within the narrow interpretation of a drain; they come within the popular conception of a drain—that is to say, they are sewers as distinguished from drains so far as the interpretation clause is concerned. There is no doubt, I think, about that.

Then let us see what the Public Health Act of 1875 says. It says in s. 13: "All existing and future sewers"—that would, I think, include all the plaintiffs' drains—"within the district of a local authority . . . shall vest in and be under the control of such local authority," with certain specified exceptions. The first exception does not in my judgment apply, but the second exception is "sewers"—which I repeat these things are—"made and used for the purpose of draining preserving or improving land under any local or private Act of Parliament," and the question is whether these sewers do or do not come within that exception.

Now what is the history of these drains? The history of them is simple enough. They were made by the plaintiffs, or rather by another railway company who were their statutory predecessors, under the powers and provisions of a special Act, passed in 1846, which incorporated the Railways Clauses Consolidation Act of 1845, including s. 68 thereof. Then again comes the question whether they were made "under any local or private Act." Mr. Buckley has contended that they were not—that they were made under the public Act. That depends upon the proper mode of considering these two Acts of Parliament. What does the public Act say? The first section explains the reason why the Act was passed. The reason is

familiar to us all, and I need not read the section. It is to prevent endless repetitions, and the section says that it is expedient to comprise in one general Act "sundry provisions usually introduced" into what I will call railway Acts, and which have been repeated from Act to Act, and it enacts that "this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed"; that is to say, this general Act shall so apply. Now how does it apply? It does not apply otherwise than as declared by the Act of Parliament, and s. 1 goes on to say how—"and this Act shall be incorporated with such Act." Stopping there, what does that mean? It means that the provisions of this Act are to be read as if they were set out at length in the other Act, as was the old practice before. "And all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act and be construed together therewith as forming one Act." All that is expressing in somewhat lengthy language what speaking shortly amounts to this—that all the sections in this general Act are to be treated as written into the special Act. That is the long and short of the matter. Then let any one read the necessary sections into this special Act, and ask himself under what Act were these sewers made. The answer must be, "Under the special Act." It appears to me that that is so plain that I am surprised that there should be any doubt about it.

If so, what becomes of the defendants' contention? It seems to me perfectly plain that if that is the true construction—as I think it is—these particular sewers have not vested in the defendants. Mr. Buckley contended that some distinction ought to be drawn between drains and so on made in the exercise of powers, and drains and so on made in the performance of statutory duties. But whether they are made under statutory powers or under statutory duties, if the powers are conferred or the duties are imposed by a local Act, the exception seems

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C. A. to apply. Turn it about as you will, the learned judge is quite right, and this appeal ought to be dismissed.

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RIGBY L.J. I am of the same opinion. I will only deal with one subject, and that is the exception. Mr. Buckley's argument was that this second exception in s. 13 was confined to Acts that could properly be called Drainage Acts or Irrigation Acts. I find nothing to justify that in the section at all. The plain meaning, to my mind, of the exception is this. You must find a sewer, which is a sewer "made and used for the purpose of draining." If there were an Act of Parliament constituting the London and North Western Railway Company, and there were only one single drain provided for in that Act, it would be made, and it would be used for drainage purposes. The Act need not be a drainage Act. It need only have that single clause with regard to a single drain. The sewer would nevertheless be made and used for drainage purposes. There was a rather ingenious attempt to transpose the words, which, if it had been permissible, might have altered the construction of the section. If you read it "made and used under an Act for drainage purposes," then that designates the Act as made for drainage purposes, and for nothing else so far as I can see. Therefore, I think the transposition is a matter of serious importance in the construction of the clause, which is not unintelligible. I think Mr. Buckley would have had very little difficulty in understanding it if it had been all that he desired; at any rate, I have no difficulty in understanding it.

VAUGHAN WILLIAMS L.J. I have nothing to add.

Solicitors: *Preston, Stow & Preston, for Ashton, Runcorn; C. H. Mason.*

W. W. K.

In re PIERCY.
WHITWHAM *v.* PIERCY.

[1888 P. 3082.]

C. A.

1898

March 10, 11.

Will—Charitable Bequest—Discretion of Trustees—Mixed Fund—Pure and Impure Personal Estate, and Proceeds of Sale of Real Estate—Gift to “such Charitable Institutions and Objects as my Trustees may determine”—Mortmain—Charitable Uses Act, 1735 (9 Geo. 2, c. 36), ss. 1, 3, 4.

A testator, who died before the Mortmain and Charitable Uses Act, 1888, by his will gave real and personal estate upon trust for sale and conversion; and directed his trustees to apply one-tenth of the fund to “such charitable institutions and objects as my said trustees may determine” :—

Held, by the Court of Appeal, (1.) that the gift applied and extended not only to the pure, but also to the impure personal estate and the proceeds of the real estate of the testator, and conferred upon the trustees a power of selection; (2.) that if and so far as the trustees selected charitable institutions and objects exempted from the operation of 9 Geo. 2, c. 36, the names of the charitable institutions and objects selected would be read into the will, and the gift would be a good charitable gift in their favour; (3.) that, as to the impure personalty and the proceeds of the sale of real estate, no exercise of the power of selection in favour of an unexempted charitable institution or object would operate as a valid gift.

If a gift of this kind gives the trustees a discretion enabling them to select such as are valid from a class including valid and invalid objects, that is sufficient to prevent the gift from being voided by the statute of 9 Geo. 2, c. 36.

Although some parts of Stuart V.-C.'s judgment in *Lewis v. Allenby*, (1870) L. R. 10 Eq. 668, may be open to comment, there is no necessary invalidity in such a gift as was the subject of that decision.

The principle upon which the Court proceeded in *Lewis v. Allenby* is the same as that on which the Court acted in *Mayor of Faversham v. Ryder*, (1854) 5 D. M. & G. 350, *University of London v. Yarrow*, (1857) 1 De G. & J. 72, and *Carter v. Green*, (1857) 3 K. & J. 591.

Johnston v. Swann, (1818) 3 Madd. 457, and *Baker v. Sutton*, (1836) 1 Keen, 224, if and so far as they differ from *Lewis v. Allenby*, must be taken to be overruled.

The judgment of North J. affirmed with a variation.

APPEAL from North J.

This was an action for the execution of the trusts of the will of the late Benjamin Piercy and the administration of his real and personal estate. The will was dated December 5, 1883, and the testator died in March, 1888, some months before the

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Mortmain and Charitable Uses Act, 1888, came into operation. Whilst the estate was in course of administration under the usual judgment a question arose as to the rights of the Attorney-General as representing charities under a charitable bequest contained in the will. The will so far as is material was as follows: The testator, after giving all his real and personal estate to trustees upon trust for sale and conversion, continued his will in the following words: "I direct my trustees to hold the moneys to arise from such sale conversion and getting in, upon trust thereout, in the first place, to pay the expenses incidental to the execution of the preceding trusts, and my funeral and testamentary expenses, and to apply one-tenth of my estate over and above £10,000*l.* to such charitable institutions and objects as my trustees may determine, and at such time or times and in such manner as they may think fit"; and the will then proceeded to declare trusts of the residue of the proceeds of sale of the testator's real and personal estate in favour of his children and other beneficiaries.

The question came before the Court upon a summons taken out by the trustees of the will asking that it might be declared what were the rights of the Attorney-General in the corpus and income of the testator's estate; and upon the summons being heard before North J. an order dated June 2, 1897, was made whereby the Court declared as follows:—

This Court doth declare that the gift in the will of the above-named testator Benjamin Piercy of one-tenth of the testator's estate over and above £10,000 to such charitable institutions and objects as his trustees might determine, applies and extends, not only to the pure personal estate, but also to the impure personal estate, and the proceeds of sale of the real estate of the testator; but that the power of selecting such charitable institutions and objects by the will given to the trustees can only be properly exercised so far as regards the impure personal estate and the proceeds of sale of the real estate in favour of such charitable institutions and objects as were at the testator's death empowered by law to take real estate or personal estate savouring of real estate by will, notwithstanding the provisions of the statute 9 Geo. 2, chap. 36, intituled "An Act to restrain the disposition of lands, whereby the same become unalienable."

The defendants the beneficiaries under the will appealed, and by their notice of appeal asked that the order might be reversed, and that in lieu thereof it might be declared that the

above gift applied and extended only to the pure personal estate, and not to any impure personal estate or any proceeds of sale of the real estate of the testator.

Swinfen Eady, Q.C., and Badcock, for the appellants. The Act 9 Geo. 2, c. 36, is not properly speaking a Mortmain Act at all. It is intituled "An Act to restrain the disposition of lands, whereby the same become unalienable," and it only imposes upon testators a testamentary disability, so as to prevent land from being given by will for charitable purposes. The question, therefore, must always be whether the testator has shewn an intention to escape from the fetter imposed by the Act. There must be something on the face of the will shewing that the testator had the Act in his mind, and desired to benefit some exempted charity as such, and to give his land or impure personalty to such exempted charity. The complete way of shewing such intention would be to provide that as to pure personalty the trustees are to give it to such charities as can take nothing but pure personalty, and as to impure personalty to such charities as can take impure personalty under a will; or it might possibly be enough to refer specially to some class of charities exempted from the Act, as, for instance, by using the word "hospital," which probably explains the decisions in *Lewis v. Allenby* (1) and *In re Ovey* (2), as indeed was pointed out by Kay J. in *In re Clark*. (3)

If in the present case the gift had been for charitable purposes without any discretion being vested in the trustees, it is clear that the gift would have failed as to land and impure personalty. How is it possible to say that by giving the trustees a discretion the testator intended to get rid of the testamentary disability imposed by the Act of Parliament? There is no case to be found which lays down any such principle, and a rule of that kind would be in direct contradiction to such authorities as *Baker v. Sutton* (4), *Johnston v. Swann* (5), and *In re Clark* (3), in all of which cases (although

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(1) L. R. 10 Eq. 668.

(3) (1885) 54 L. J. (Ch.) 1080; 33 W. R. 516.

(2) (1885) 31 Ch. D. 113.

(4) 1 Keen, 224.

(5) 3 Madd. 457.

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there was an absolute discretion in the trustees) the gift to charities was held to fail so far as concerned the impure personal estate. Such a rule would also be inconsistent with what was done in *Paice v. Archbishop of Canterbury* (1), and *Nightingale v. Goulburn*. (2) Moreover, if there had been any such principle as is now contended for by the Attorney-General, it would have been unnecessary, in the cases of *Attorney-General v. Stewart* (3) and *Whicker v. Hume* (4), to argue at great length whether colonial lands were included in the statute. *Grimmett v. Grimmett* (5) and *Sorresby v. Hollins* (6), upon which *Lewis v. Allenby* (7) proceeded, and later authorities of the same sort, belong to a different class of cases, in which no question arose as to the property which passed, or as to the objects of the testator's bounty. In all those cases there was a gift of pure personal estate to some specified charity, and the question was whether the trustees were at liberty to defeat the testator's intention by investing the money in the purchase of land or on mortgage. Lastly, the Court never marshals in favour of charities: *In re Arnold* (8); and the present will contains no indication of an intention that there shall be any marshalling in favour of any particular class of charities. If, however, it should be held that the gift does not necessarily fail altogether as to land and impure personal estate, then the discretion given to the trustees is in fact a power of appointment, and when they have exercised that power the names of the charities chosen by them must be read into the will, and then the question will arise how far the Act applies to any of the charities so indicated.

Sir R. E. Webster, A.-G., and Ingle Joyce, for the Crown. We are not here to say that the trustees have no discretion. We say that the gift in this case extends to and includes impure personal estate and the proceeds of the sale of real estate. *Lewis v. Allenby* (7) was decided in the year 1870, and has not since been seriously questioned. The gist of that

(1) (1807) 14 Ves. 364.

(2) (1847) 5 Hare, 484.

(3) (1817) 2 Mer. 143.

(4) (1858) 7 H. L. C. 124.

(5) (1754) Amb. 210.

(6) (1740) 9 Mod. 221.

(7) L. R. 10 Eq. 668.

(8) (1888) 37 Ch. D. 637.

decision is that a gift of impure personalty to such charities as the trustees may select is not invalid. The discretion of the trustees, however, can only be properly exercised in favour of charities exempted from the law of mortmain. In *Luckraft v. Pridham* (1) no objection appears to have been taken to the inquiry being added (2) as to whether any of the Plymouth charities were capable of acquiring by will the proceeds of sale of land; nor did any member of the Court of Appeal suggest that the bequest in that case of proceeds of real estate and impure personal estate to charities at Plymouth to be named by the trustees was void. In *In re Clark* (3) the gift to the poor was not specific enough to attract the doctrine of *Lewis v. Allenby*. (4)

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[RIGBY L.J. referred to *University of London v. Yarrow*. (5)]

That case is a strong authority in our favour. In *In re Ovey* (6), although *Lewis v. Allenby* (4) does not appear to have been mentioned, the same principle was applied by Pearson J., and the trustees were held entitled to appropriate the surplus to hospitals authorized to take land by devise. In *Re Smith* (7), *Lewis v. Allenby* (4) was followed by North J. In *In re Clark* (3) Kay J. did not question *Lewis v. Allenby* (4), but distinguished it on the difference in the wording of the two wills. The *Mayor of Faversham v. Ryder* (8) is another illustration of the principle laid down in *Grimmett v. Grimmett* (9), as also is the case of *Carter v. Green*. (10) *Johnston v. Swann* (11), which, however, Lord Cottenham, in *Ellis v. Selby* (12) considered to be at variance with the other cases, is certainly to some extent an instance of the contrary principle being applied; but the main question there was whether there was any valid charitable gift at all, and the Solicitor-General admitted that the 1000*l.* of impure personalty went to the next of kin. In *Baker v. Sutton* (13) the Attorney-General does not appear to have been

- (1) (1877) 6 Ch. D. 205.
(2) 6 Ch. D. 206.
(3) 54 L. J. (Ch.) 1080; 33 W. R.
516.
(4) L. R. 10 Eq. 668.
(5) 1 De G. & J. 72.
(6) 31 Ch. D. 113.

- (7) (1894) 73 L. T. 732, n.
(8) 5 D. M. & G. 350.
(9) Amb. 210.
(10) 3 K. & J. 591, 603.
(11) 3 Madd. 457.
(12) (1836) 1 My. & Cr. 292.
(13) 1 Keen, 224.

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present, and the whole question was whether the words "mortgage security" must mean a mortgage on land. In *Nightingale v. Goulburn* (1), the real point was as to 20,000*l.* pure personalty, and on appeal the Lord Chancellor (2) thought there was no discretion reposed in the legatee.

From 1845 to the present time there is nothing in the books really contravening the doctrine of *Lewis v. Allenby*. (3) It cannot be said that the testator in the present case did not intend to give his trustees a discretion to act in a legal way, and the words are apt and sufficient to give them a discretion which could be lawfully exercised. If there is an alternative mode of carrying out the gift without bringing it within the Statute of Mortmain, that mode ought to be adopted. If the gift is bad at all, it can only be so by reason of the Act of 9 Geo. 2, c. 36. But there is nothing in any of the provisions of that Act to invalidate such a gift, although, if a charity not exempted from the Act were selected, it could not take any share of the proceeds of the real or impure personal estate. You must read into the will the names of the charities selected by the trustees. No question of invalidity can arise until the selection has been made. It is open to the trustees to select as they please, and there can be no invalidity if they name an exempted charity. Charities exempted by later Acts are just upon the same footing as the universities, colleges, and schools mentioned in the 4th section of 9 Geo. 2, c. 36.

Cozens-Hardy, Q.C., and *F. Thompson*, for the trustees.
Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

March 11. LINDLEY M.R. The appellant in this case asks that the decision of North J. may be reversed, and that it may be declared that the gift in the will of one-tenth of the testator's estate over and above 110,000*l.*, to such charitable institutions and objects as his trustees might determine, applies and extends only to the pure personal estate. Whether it does so or not was the main controversy; and the real question comes

(1) 5 Hare, 484.

(2) (1848) 2 Ph. 596.

(3) L. R. 10 Eq. 668.

to this: Is the Court prepared to overrule the decision of Stuart V.-C. in the case of *Lewis v. Allenby*? (1) I will read the material passage in the will. [His Lordship then did so, and continued:—]

Now, what is the true test to apply to a disposition of that kind? It is said to infringe the Act which is commonly called the Mortmain Act, but is more properly described as the Charitable Uses Act of 9 Geo. 2, c. 36, to which I will refer shortly. We all know that that Act of Parliament affected the power to dispose of lands, and was contrasted with the Mortmain Act, which applied rather to the power to take and to hold land. The important clauses in the Charitable Uses Act are the 1st and 3rd sections. The 1st section enacts, reading it shortly, that no lands, or any sum of money to be laid out in the purchase of lands, shall be given, granted, or aliened “to or for the benefit of any trust or for the purpose or benefit of any charitable uses whatsoever unless it is by deed enrolled”; and s. 3 provides that all gifts, grants, and appointments which are contrary to that section shall be absolutely and to all intents and purposes null and void. Then s. 4 introduces certain exceptions in favour of the two Universities, the schools of Eton, Winchester, and Westminster, and the colleges at the Universities. Since that Act was passed there have been a great number of other Acts of Parliament extending the exemptions; so that when the testator made his will there were a great many charities which were exempted from the operation of the statute of 9 Geo. 2.

Now, without at present going into the cases or considering how far there is authority upon the subject, I will state my own view of what I think is the true principle to be applied. I cannot read this as a bequest to any charitable institution or object nominated or pointed out by the testator. It is like a power given to persons to appoint a fund to any charity, or charitable institution or object they think fit; and until that power is exercised you cannot say what the testator has done or what he has not done. If the trustees, having this power, should appoint to any particular institution, then, following out

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the analogy to which I am alluding, you read the name of that institution into the will; and if the trustees have appointed to a charity which cannot take, then that appointment must fail so far as the Act I have referred to applies to the property appointed. The appointment may be good as to personal estate and bad as to the rest. If, on the other hand, the trustees appoint to some charitable institution which is not hit by the statute of 9 Geo. 2, then you read the name of it into the will, and the gift is perfectly good.

If, then, the question had now arisen for the first time whether a disposition in a will, or a devise or bequest to trustees with a power of appointment such as I am supposing, was valid or invalid, I should have thought on principle that the Charitable Uses Act did not render it invalid. Then, if we look at the authorities, I think that *Lewis v. Allenby* (1) is a decision which goes the length of saying that such a gift is perfectly valid. I do not myself quite follow the reasoning of Stuart V.-C. in *Lewis v. Allenby* (1), but the decision has been considered right and has been acted upon from the time when it was pronounced until now. I find it referred to without any comment in the standard text-books to which we are accustomed to look. It is in all the editions of Lewin on Trusts, and Jarman on Wills, and Theobald's Law of Wills. Speaking from my own recollection, I do not remember that it has been seriously contested. It has presented difficulties, but that is, to my mind, because the meaning of the Vice-Chancellor is not very clearly expressed. But it has certainly been acquiesced in and followed. I think that Pearson J. in *In re Ovey* (2), and North J. himself in *Re Smith* (3), may both be called in aid on this point. But even apart from those authorities, I must say that I think the real principle applicable to the case is that which I have above applied. That was the principle upon which Lord Hardwicke proceeded in *Grimmett v. Grimmett* (4), the Court of Appeal proceeded in *Mayor of Faversham v. Ryder* (5), and upon which Wood V.-C. proceeded in *Carter v. Green*. (6)

(1) L. R. 10 Eq. 668.

(2) 31 Ch. D. 113.

(3) 73 L. T. 732, n.

(4) Amb. 210.

(5) 5 D. M. & G. 350.

(6) 3 K. & J. 591, 603.



Now, applying those principles to the present case, I come to the conclusion that there is nothing amiss with this gift to the trustees. The validity of what they may do is quite another matter.

It is said that this view is opposed to two cases which unfortunately were not cited before Stuart V.-C. when he decided *Lewis v. Allenby*. (1) These are *Baker v. Sutton* (2) and *Johnston v. Swann* (3); and unquestionably, if you look at the orders made and at what was done in those cases, the decisions therein are apparently opposed to the view taken by Stuart V.-C. in *Lewis v. Allenby*. (1) But in neither of those cases was the precise point argued, and in neither of those cases does it appear what view the trustees took—whether they claimed the legacy and the right to exercise the power, or whether they did not. Of course, it is quite possible that in both of those cases the trustees may not have claimed the right at all, but left the Court to deal with it. If that is the explanation, as it well may be, of *Johnston v. Swann* (3) and *Baker v. Sutton* (2), then they are not opposed to the view I am expressing. If they are opposed to it, I am bound to say that on principle I think the decision in *Lewis v. Allenby* (1) is right, although, as I said before, I do not quite follow the reasoning of the Vice-Chancellor in that case, for he seems to have construed the will as amounting to an exclusion of those institutions which could not take mixed personalty or the proceeds of the sale of realty. That is where I fail to follow him. I do not think that that is so. I look upon it simply as an ordinary power of appointment which may be properly or improperly exercised; and until we know what the trustees do in the exercise of their power, we cannot say that this disposition conferring the power is bad. I therefore think the appeal must be dismissed with costs.

RIGBY L.J. I am of the same opinion. Whatever may have been the ideas of the Vice-Chancellor as to *Baker v. Sutton* (2) and *Johnston v. Swann* (3) at the time when *Lewis v. Allenby* (1) was decided, the law was, to my mind, clearly laid

(1) L. R. 10 Eq. 668.

(3) 3 Madd. 457.

(2) 1 Keen, 224.

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down on such a principle as to justify the order that was made in that case—to justify it, to my mind quite irrespective of any reasons that could have been given by the learned Vice-Chancellor or any criticism that has been passed upon it since. For my purpose I need only refer to the case of *University of London v. Yarrow* (1), mentioned by me during the argument, which was decided by the Court of Appeal, consisting of Lord Cranworth L.C., and Knight Bruce and Turner L.JJ. That case sums up sufficiently for my purpose the result of previous authority. It was decided in the year 1857, and in it the Court of Appeal, on an appeal from Sir John Romilly M.R., had to decide as to the validity of a bequest contained in the will, dated in 1846, of one Thomas Brown, “formerly residing in Harcourt Street, Dublin, and afterwards at Rosey Park Hill, of the Grange, in the county of Dublin.” The gift was to the Chancellor, Vice-chancellor and Fellows of the University of London for the purpose of founding, establishing, and upholding an animal sanitary institution within a mile of Westminster, Southwark, or Dublin. There were other objections taken to the charity which are immaterial for the present purpose; but the real difficulty was that the will pointed to establishing and founding an institution near Southwark, Westminster, or, in the alternative, Dublin, so that the trustees might build in England, which would invalidate the bequest as involving the purchase of land in England. Now, I am perfectly aware that Lord Cranworth, who gave the leading judgment on that occasion, expressed a doubt whether, if the option had not been given for the founding of the institution near Dublin, he might not still have got over the difficulty under the Statute of Mortmain. But that was not the point upon which the case was decided. It was decided upon the principle that where objects were pointed at, some of which were illegal, but with an alternative object which would be legal, the fact that the power of selection given to the trustees included a legal object was quite sufficient to take it out of the Statute of Mortmain. That goes very much further than the numerous cases, one or two of which were cited here, as to investments. It went to the question of

(1) 1 De G. & J. 72.

whether the gift was or was not valid, because it was for certain purposes some of which were valid though the others would be invalid. I do not propose to read much of the report, but I will say this, that the Court treated it as a perfectly clear case on that issue. The Lord Chancellor said, "I cannot say that I have any doubt about this case." Then he goes into the question of whether or not it was in its nature a charity, and that we have nothing to do with here. It was held that it was a charity. "There is more plausibility," he said (1). "in the argument that this charity is void under the Statute of Mortmain" (clearly meaning the statute of 9 Geo. 2, c. 36) "because, as it is said, it points to a foundation which requires the purchase of land. I think it, however, a complete answer to that argument, that the will points only to the purchase of land, either in the neighbourhood of London, or in the neighbourhood of Dublin." Then the Lord Chancellor observes that the neighbourhood of Dublin was not inserted fraudulently to avoid the operation of the statute, but because the testator had lived at Dublin and was living in the county of Dublin. The Lord Chancellor continues, and this is rather important: "He therefore gives the option of founding the institution either in London or in Dublin, and putting it at the worst, he cannot be held to have said more than this, that it shall be established at one of two places, thinking both of them lawful, whereas only one is lawful." Then he goes on: "On this point the doctrine of *Sorresby v. Hollins* (2), before Lord Hardwicke, is applicable. There have also been many other cases where a testator has given an option to trustees" (investment cases) "to invest property in one of two ways, the one lawful and the other not, and it has never been held that the Statute of Mortmain interfered with the validity of the bequest." That is all that is important, and the Lord Chancellor concludes: "The case appears to me so entirely correctly decided by the Master of the Rolls, and the appeal so thoroughly without foundation, that it must be dismissed with costs." And Knight Bruce L.J. says (3): "I have no recollection of an appeal more plainly

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(1) 1 De G. & J. 80.

(2) 9 Mod. 221, cited Amb. 211.

(3) 1 De G. & J. 81.

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void of sense and reason, and it would be privately unjust, and mischievous against the public, to do otherwise than dismiss it with costs." Turner L.J. agreed. Now what does that involve? It seems to me to involve the whole question. Down to that time the principle was that if the testator has pointed out two objects, one lawful and the other unlawful, the power of the trustees to select the lawful one renders the charitable bequest good. I will not say anything as to what the result of the selection by the trustees may be. At present they have the power to select objects which are perfectly within the Act. There is no doubt at all about the testator's intention that all this mixed fund should go to charities, and that intention can have effect perfectly well given to it by giving the impure personalty to any one or more of the exempted charities. It would be impossible to hold, after the decision I have just referred to and the broad extent of the reasoning of the judges, even if there had never been such a case as *Lewis v. Allenby* (1), that there was any fatal objection to this gift such as the appellants ask us to hold.

There was a question raised about the second part of the declaration made by North J., and for the purpose of shortening the case we asked the Attorney-General to submit to a modification of that, and I think that he was ready to go so far as to say that he would omit it if it were necessary. I have not consulted my colleagues on this point, but, for my own part, I think it would be better, in order to keep faith with counsel, that we should change that part of the order without saying that it is wrong. I do not say that it is wrong, but we did not allow it to be fully argued, and I think we might put that part of the declaration into a negative form, and say that no gift of mixed personalty to any unexempted charity would operate as an effectual gift to that charity. That would remove the ambiguity which appears to exist, and then the state of things would be this—the trustees, being parties, will know plainly that they would be doing that which would frustrate, as far as they could, the testator's intention, if they apply any part of

(1) L. R. 10 Eq. 668.

this fund to unexempted charities. There may be a question (and I will not say more about it) whether they can, if they choose to do that, frustrate the testator's intention. They are trustees who have accepted the trusts of the will, and whose *primâ facie* duty at any rate is to carry out those trusts in a legal manner, if it can be done. I say nothing further than that they will take their own course upon it, and a question may arise hereafter as to the effect of the course they have taken.

The other authorities, *Baker v. Sutton* (1) and *Johnston v. Swann* (2), I take to have been overruled if and so far as they differ from *Lewis v. Allenby*. (3) The point decided in *Lewis v. Allenby* (3) was never specifically brought before the Court until that case, and no decision to the contrary of the principle on which the Court proceeded in that case can be said to exist in the way of authority against *Lewis v. Allenby*. (3) To the cases that have happened since I do not attach much importance. In *In re Clark* (4) Kay J. was dealing with a question which is not relevant here; and I cannot see how in the particular case of *Lewis v. Allenby* (3) the mere mention of "hospitals" as a class of charities could assist one way or the other. For the present purpose all charities are divided into two categories—those that can take notwithstanding the Act of Geo. 2, and those that cannot take. The use of the word "hospitals" does not carry you any further. Hospitals are divisible into the same two categories; and I do not think that the presence of such a word assists at all, or that the absence of it could in any way differentiate the case. In *In re Clark* (4) there was a plain object, "to give it to the poor as they" (the trustees) "may think fit," and I think it was quite a sufficient circumstance to distinguish that case in principle from the one that we are now deciding.

VAUGHAN WILLIAMS L.J. I agree. I should add nothing at all, if it were not that I myself think that in giving this decision we are not following *Lewis v. Allenby* (3); and as I take

(1) 1 Keen, 224.

(2) 3 Madd. 457.

(3) L. R. 10 Eq. 668.

(4) 54 L. J. (Ch.) 1080; 33 W. R. 516.

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that view, I think it right to say so. It seems to me that in *Lewis v. Allenby* (1) it is tolerably clear that Stuart V.-C. meant to decide that a gift would not be outside the provision contained in the 1st and 3rd sections of 9 Geo. 2, c. 36, unless in a case where it included the gifts avoided by those sections; you might include gifts within those sections unless there were words excluding that which might be so included. It seems to me that the learned Vice-Chancellor, having decided that, proceeded to say that in his opinion he did find in *Lewis v. Allenby* (1) something that excluded from the words of the bequest, which were general, enough to include a bequest within the avoiding scope of those sections—something which in his opinion was sufficient to exclude such matters. I entirely agree with what has been said by Rigby L.J.—that it is very difficult to see what it was the learned Vice-Chancellor found which could operate as such an exclusion; but still to my mind it is perfectly plain that he did mean to lay down the rule that you must have such words of exclusion, and to find that in this case there were such words.

I want to point out also that when Kay L.J. (then Kay J.) gave his decision in *In re Clark* (2) he clearly was right, and understood the decision of Stuart V.-C.; and he proceeds to decide *In re Clark* (2) itself upon the very ground that he cannot find in the bequest in that case any sufficient words of exclusion. But he says: "Yet I cannot say that that class of charity"—that is the class of charitable institutions which are exempted from the operation of this Act—"is sufficiently indicated as being amongst the objects intended to be benefited by the testatrix to enable me to read this as a gift of the impure personalty to charities authorized to hold property of that nature, and I have certainly no wish to extend the rules applicable to cases of this kind."

What we really have to decide in the case before us is whether or not it is necessary that the gift, to be outside this Act of Parliament, should contain some words excluding legacies of the kind defined in ss. 1 and 3, or some disjunctive words enabling you to treat the bequests as two alternative

(1) L. R. 10 Eq. 668.

(2) 54 L. J. (Ch.) 1080; 33 W. R. 516.

bequests. To my mind, if you look at *Grimmett v. Grimmett* (1), which was the earliest authority cited, it seems clear that Lord Hardwicke took a view in accordance with the view that I think Stuart V.-C. and Kay J. took. Because he says (2), quoting his own decision in *Sorresby v. Hollins* (3): "If a devise is in the disjunctive, and leaves the executors to two methods to do a particular thing; the one lawful, the other prohibited by law; can any Court say, because one method is unlawful, that therefore the other is so too, and the whole bequest is void?" He seems to consider that the law which he is there laying down only applies to a case where you have got a disjunctive form such as he speaks of there. I agree most entirely that it is very much better that we should not limit the doctrine there laid down in the way in which to my mind it has been limited both in *Grimmett v. Grimmett* (1) itself, and in *Lewis v. Allenby* (4), and in *In re Clark* (5), and tacitly as was done both in *Baker v. Sutton* (6) and in *Johnston v. Swann*. (7) Therefore I quite agree with what I understand to be our decision to-day, that it is sufficient to prevent a gift being avoided by this statute, even though the gift is a gift under words sufficiently wide to include the cases which clearly fall within those sections, if the gift gives a discretion to trustees enabling them to select such as are valid from the general class, including some valid and some invalid objects. It seems to me a much more reasonable and convenient doctrine to hold that in such a case the gift would be a good gift, and outside the statute, in respect of such purposes as the trustees in their discretion apply the gifts to as are valid, and not within the exception. I only wish to add that I do not for myself express any opinion as to whether, if the trustees in this particular case were to select institutions for the benefit of this charity which fall within the class which is not exempted from the operation of this statute, that that would be an exercise of their powers under this will in such a sense as that they could not

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(1) Amb. 210.

(2) Ibid. 212.

(3) 9 Mod. 221, cited Amb. 211.

(4) L. R. 10 Eq. 668.

(5) 54 L. J. (Ch.) 1080; 33 W. R.  
516.

(6) 1 Keen, 224.

(7) 3 Madd. 457.

C. A. subsequently exercise the powers in respect of objects which  
1898 were not covered by this section.

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LINDLEY M.R. With reference to the second part of the declaration made by North J., I think it had better be struck out or be put in a negative form.

*Sir R. E. Webster, A.-G.* I think we are practically agreed as to the form the declaration should take.

*Badcock.* I think we had better consider the matter, and if we cannot agree upon the wording of this part of the declaration it can be struck out.

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The Order drawn up was, so far as is material, to the following effect :—

Order that the said Order dated June 2, 1897, be affirmed subject to the variation following, namely, the insertion (in lieu of the words in the said Order beginning “but that the power of selecting such charitable institutions and objects,” and ending “whereby the same become unalienable”) of the declaration that, as far as regards the impure personalty and the proceeds of sale of real estate, no exercise of the power of selection by the will given to the trustees, in favour of any charitable institutions or objects which were not at the testator's death empowered by law to take such property notwithstanding the provisions of the statute 9 Geo. 2, c. 36, will be operative as a gift to such charity.

Solicitors : *Crowders & Vizard ; Field, Roscoe & Co. ; The Treasury Solicitor.*

W. W. K.

## MANNERS v. PEARSON &amp; SON.

[1896 M. 1603.]

C. A.

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March 2, 3,  
23.

*Action for Account—Contract—Works Abroad—Periodical Payments—Unascertained Amounts—Foreign Currency—Rate of Exchange—Period of Conversion into English Money.*

The defendants in 1891 entered into a contract with M. to pay him monthly one cent in Mexican currency per cubic metre of certain excavation works being done in Mexico, as and when payment should be received by defendants from the Mexican authorities; and during M.'s life they duly paid him. M. died in June, 1894; but he had no legal personal representative till May, 1896, when the plaintiff became his administrator.

In an action for account brought by the plaintiff in June, 1896, the Court, on November 4, 1897, declared that he was entitled to an account of what was due under the contract, and on November 13 the defendants delivered an account shewing that 19,366 Mexican dollars were due to the plaintiff on August 31, 1896, and offering to pay that amount in Mexican currency or in English currency at the rate of exchange on November 13. On August 31, 1896, the Mexican dollar was worth 2s. 6d., on November 13, 1897, it was only worth 1s. 10½d.; and the plaintiff refused the defendants' offer, and contended that the value of the dollar should be ascertained at the several times the monthly payments became due, or, in the alternative, on August 31, 1896:—

*Held*, by the Court of Appeal (Vaughan Williams L.J. dissentiente), dismissing an appeal from Kekewich J., that the plaintiff was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained.

Observations upon the principles applicable where a plaintiff sues a defendant in England for an account upon a contract to pay in a foreign currency.

## APPEAL from Kekewich J.

This action was brought by the legal personal representative of Arthur Duff Morison, deceased, for account of what was due from the defendants to the plaintiff in respect of commissions under a contract in writing made between Morison and the defendants, and dated October 6, 1891. The contract was in the English language, and was entered into in Mexico between Morison, described as of the city of Mexico, of the one part, and the defendants, described as of 10, Victoria Street, Westminster, and thereafter called the contractors, of the other part; it was signed by Morison in Mexico, and by the

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defendants in London, and by it the defendants agreed to pay Morison (1.) the sum of 595*l.* 17*s.* 6*d.* in English money on the execution of the agreement; and (2.) one cent in Mexican currency for every cubic metre of certain excavation works mentioned in the agreement, which money was payable from time to time as and when the same should be received by the defendants from the Junta or committee of management of the drainage works of the city and valley of Mexico.

The contract also provided as follows:—

“ 3. The contractors shall within one month from the date of this agreement, and monthly thereafter, make and furnish to the said A. D. Morison a statement in writing of the total number of cubic metres of excavation which shall have been done by the contractors and paid for by the Junta to them as aforesaid up to the date of such account and of the amount then payable to the said A. D. Morison at the rate of 1*c.* per cubic metre, and the contractors shall be entitled to take credit for and deduct therefrom all sums paid by them to the said A. D. Morison on account thereof as per statement attached, and they shall immediately thereafter pay the balance appearing by such account to be due to him. 4. Subsequent payments shall be made by the contractors to the said A. D. Morison as and when the contractors shall from time to time receive from the Junta payment for excavation done by them ” as therein mentioned.

The sum of 595*l.* 17*s.* 6*d.* was duly paid by the defendants to Morison, and so long as he lived the defendants paid him all that became due to him under the contract.

Morison died on June 14, 1894, and no one became his legal personal representative until May 29, 1896, when the plaintiff took out letters of administration to his estate.

On June 11, 1896, the plaintiff brought this action for an account, which the defendants resisted upon grounds not now material. The action did not come on for trial until November 4, 1897. By the judgment, which was delivered the same day, the Court declared that the plaintiff was entitled to have an account taken of what was due and payable to him as legal personal representative of Morison under and by virtue of



the agreement of October 6, 1891, and in taking such account the defendants were to be credited with certain sums therein mentioned as to which no question arose, the defendants were to pay to the plaintiff two-thirds of the taxed costs, and the parties were to be at liberty to apply to the Court to have the account taken by the Court if necessary. The judgment contained no directions as to the way of taking the accounts, nor any orders or inquiries for the purpose of fixing the defendants with anything more than the balance which might be found due as the result of taking the account. The defendants had made no other payments since Morison's death, but had always kept proper accounts of the sums payable to Morison's estate in Mexican dollars; and on November 13, 1897, in order to avoid having the account taken in chambers, they delivered an account shewing that a balance of 19,366 dollars in Mexican currency was due to Morison's estate on August 31, 1896, which sum they offered to pay in dollars, or in English money equal to the value of the dollars on November 13, 1897. This account did not profess to be a final account, as certain further sums would become payable for commissions on the completion of the excavation contract entered into by the defendants, but it included everything down to the date of its being rendered, and, so far as the balance in Mexican currency was concerned, it was admitted by the plaintiff to be correct.

The plaintiff, however, contended that the account had not been rightly taken, and that it ought to have been taken upon the principle of charging the defendants with the sums payable monthly turned into English money at the respective dates on which they became payable; whilst the defendants contended that the ultimate balance only ought to be turned into English money. Moreover, the plaintiff contended that even if the defendants were right in their first contention the balance ought to be turned into English money on August 31, 1896, when the account was complete. At that date the Mexican dollar was worth 2*s.* 6*d.* The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the actual amount was first ascertained, and when the dollar was worth only 1*s.* 10½*d.*

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In these circumstances the plaintiff on February 11, 1898, moved before Kekewich J. that, it having been declared by the judgment that the plaintiff was entitled to an account, it might be further directed that such account should be taken with monthly rests, and that in taking it the amount of Mexican dollars found due at the foot of each monthly account might be converted into English money sterling as on the date of such monthly account, and at the rate of exchange prevailing at that date; or, in the alternative, that the amount of dollars found due at the end of each year should be converted into English money either at the end of such year, or at the date of the grant of administration, or at that of the judgment, at the rate of exchange at those dates respectively prevailing; or, in the further alternative, at such date and rate of exchange as the Court should deem fit, and that the defendants should pay interest at 4 per cent. per annum from the date of the judgment upon the amount found due.

The learned judge by his judgment refused to make any order on this motion, and dismissed it with costs, being of opinion that the defendants were right in both their contentions.

From this decision the plaintiff appealed, and by his notice of appeal he asked that the order made by Kekewich J. on February 11, 1898, might be reversed, and that in lieu thereof it might be declared that the plaintiff was entitled in the taking of the account to have the amount of Mexican dollars found due at the end of each month converted into English money as on the date on which, under the agreement, the balance due on each such monthly account became payable, and at the rate of exchange prevailing at such date, or, in the alternative, that the plaintiff was entitled to have the amount of dollars found to be due on August 31, 1896, converted into English money at the rate of exchange prevailing on that day, or, in the alternative, at the rate of exchange prevailing on such date as to the Court should seem fit.

The appeal came on for hearing on March 2, 1898.

*H. Terrell, Q.C., and Cecil Walsh*, for the plaintiff. The question is, when an action is brought in this country for the

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payment of moneys due periodically in a foreign currency, at what date or dates the rate of exchange ought to be determined. We say that the moneys ought to be converted into English currency at the date at which the payments in the foreign currency ought to have been made. The English judgment must be expressed in English currency.

In this case certain sums became due to the plaintiff under this contract at the end of each month, but he could not obtain payment until the amounts were ascertained. Where an action is brought for an account of sums due under a foreign contract which provides for periodical payments, the proper course is to take the account for each month in the foreign currency, and then convert the monthly balances into English currency. The object of the Court in determining the date of the conversion must be to place the plaintiff suing upon a foreign contract in as nearly as possible the same position as if the contract had been fulfilled, and it cannot be right that the defendants should be allowed to make a profit by committing a breach of their contract. This action ought not to be treated simply as an action for the balance ultimately found due on the account.

The principle for which we are contending has been established by numerous authorities, and is of universal application; it has been applied to legacies, to foreign bills, to foreign judgments, and to money had and received: *Cash v. Kennion* (1); *Cockerell v. Barber* (2); *Scott v. Bevan* (3); *Bertram v. Duhamel* (4); *Suse v. Pompe*. (5) Why then should it not be applied to the present contract?

[LINDLEY M.R. If you had brought an action every month you would have recovered on the principle for which you contend, but you have brought one action for an account, and the judgment is for the balance found due on that account. Why should you be treated as having recovered judgment for each monthly payment?]

For this purpose there is no difference between an action for account and an action for debt.

(1) (1804) 11 Ves. 314, 316.

(3) (1831) 2 B. & Ad. 78.

(2) (1810) 16 Ves. 461.

(4) (1838) 2 Moo. P. C. 212.

(5) (1860) 8 C. B. (N.S.) 538.

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Assuming this to be treated as an action for the balance found due on the account, the conversion ought to take place on the date at which the account was complete, namely, August 31, 1896. The respondents admit by their account that 19,366 Mexican dollars were due to us under the contract on that day. The judgment of November 4, 1897, together with the account delivered in pursuance thereof on November 13, 1897, places us in the same position as if we had sued upon an indebitatus count for that amount of dollars payable on that day, and had recovered judgment.

*Renshaw, Q.C., and Tanner*, for the defendants. The only right of the plaintiff to obtain conversion of the Mexican dollars arises from the fact that he has elected to bring an action in this country. This action alone renders conversion right or necessary, and, therefore, the date of the conversion must be subsequent to the commencement of the action, namely, June 11, 1896. We submit that the proper date for conversion is the date of the order for payment of the balance found due on the account. This case differs from all the cases cited, because here there is not any fixed sum due under the contract at a certain date.

[They referred to Story on the Conflict of Laws, s. 309 and following sections.]

*H. Terrell, Q.C.*, in reply, referred to *Delegal v. Naylor* (1) and Westlake on Private International Law, 3rd ed. § 226, p. 265.

*Cur. adv. vult.*

March 23. LINDLEY M.R., after stating the facts, continued as follows:—Before considering the questions raised by this appeal it is necessary to ascertain the grounds on which any judgment or order for payment in English money can be properly made in a case where the plaintiff sues upon a contract to pay in the currency of a foreign country. The terms of the contract confer no right to payment in English money. If the defendants had tendered to their creditor either in Mexico or wherever he demanded payment the amounts due from them

in Mexican dollars at the proper times they would have offered to perform their obligations in strict accordance with their contract.

The necessity for considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and, speaking generally, the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution. Whether before the Debtors Act an order in Chancery for the payment of so many Mexican dollars could have been made and could have been enforced by attachment I do not pause to inquire.

With this possible exception the above statement is correct and affords the true explanation of the necessity for considering how much money in English currency the defendants ought to pay the plaintiff. If the defendants were within the jurisdiction of any other civilized State and were sued there, as they might be, the Courts of that State would have to deal with precisely the same problem, and to express in the currency of that State the amount payable by the defendants instead of expressing it in Mexican dollars. If this be the true explanation of the necessity for expressing in English money what the defendants ought to pay, it follows that such necessity does not arise until the Court orders payment. But it does not follow that the sum to be inserted in the order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable, not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any judgments or order for payment.

The foregoing considerations furnish the principles on which the present case must be decided; and that principle was clearly

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expressed by Lord Eldon in *Cash v. Kennion*. (1) He said (2) : "I cannot bring myself to doubt, that, where a man agrees to pay 100*l.* in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." The application of this principle to various circumstances is illustrated by other decisions (e.g., *Cockerell v. Barber* (3), *Scott v. Bevan* (4) and *Bertram v. Duhamel* (5)), but it is unnecessary to refer to them at length, and I pass to the facts of the present case.

It must be borne in mind that for two years after Morison's death he had no legal personal representative to whom the defendants could pay anything. During all that time the defendants did not break their contract in not making the payments which they had agreed to make, and, there being no breach of contract, damages for non-payment during that time are out of the question. Moreover, there is no evidence that interest is payable by the law of Mexico on debts in respect of which there is no contract to pay interest, as is the case here. When in May, 1896, the plaintiff became Morison's administrator, he became entitled to demand from the defendants—first, payment at once in Mexican dollars of all arrears due under the contract; secondly, payment in future, in Mexican dollars and at the stipulated times, of the amounts which should thereafter become due under the contract. Failure by the defendants to make these payments would be breaches by them of their contract, and would expose them to claims for damages in some shape or other.

How these damages would have to be ascertained by an English Court if it became necessary to assess them is a question of some difficulty, as will be seen by turning to Story's *Conflict of Laws*, ss. 308, et seq., and Sedgwick on *Damages*, 3rd ed. p. 250. But, for reasons which I proceed to state, I am of opinion that no claim by the plaintiff to damages in any

(1) 11 Ves. 314.

(2) *Ibid.* 316.

(3) 16 Ves. 461.

(4) 2 B. & Ad. 78.

(5) 2 Moo. P. C. 212.

shape can be supported in the present case. The order of November 4, 1897, was the judgment on the trial of the action, and it limits the right of the plaintiff to an account of what is due to him from the defendants under their agreement with Morison. This judgment excludes all claim to damages for non-payment of particular sums charged against the defendants in taking the account. If the plaintiff wanted to charge the defendants with damages in taking the account, he should have obtained some declaration or inquiry entitling him to such damages. Before the Judicature Acts, no one ever heard of investigating damages in taking an account in Chancery of money due under a contract. Since the Judicature Acts, damages can be given in the Chancery Division where they could not have been given before; but even now a judgment or order for an account of what is due under a contract does not involve an inquiry as to damages in taking the account.

The absence from the judgment of November 4, 1897, of any declaration or inquiry as to damages is easily explained by the long delay in obtaining letters of administration to Morison's estate, during which time no damages could be payable by the defendants; but even as to damages since the plaintiff obtained letters of administration, the judgment pronounced is fatal to the plaintiff's first contention, that he is entitled to have all sums payable by the defendants turned into English money at the times when those sums became payable according to the terms of the contract. Such a contention can only be supported on the theory that the defendants are liable for damages for default in payment. To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter.

Even as regards the balance of 19,366 dollars found due to the plaintiff, I see no grounds for awarding him damages for the non-payment of that sum before it was ascertained. The plaintiff urges that it now appears that this sum ought to have been paid on August 31, 1896; but how could it have been paid

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then when no one then knew what the amount payable was? The sum in question is the balance due on taking the whole account. Under the judgment of November 4, 1897, the defendants are not chargeable with damages for delay in accounting, any more than they are chargeable with damages for not punctually paying sums properly placed to their debit in taking the account. Moreover, no undue delay in accounting was proved so far as we know. As soon as the balance was ascertained the defendants offered to pay it to the plaintiff either in Mexican dollars or in English currency equal to their then value, as the plaintiff might prefer. This offer the plaintiff declined. In my opinion the defendants have been in the right throughout in this particular controversy, having regard as we must to the terms of the contract and to the judgment of November 4, 1897, which is not appealed against. The appeal, in my opinion, fails, and ought to be dismissed with costs.

RIGBY L.J., after stating the facts of the case :—The plaintiff was not, in my judgment, entitled to a direction to the effect of any one of the alternatives suggested in the notice of the motion which was heard on February 11, 1898, though probably the defendants would have had no objection to that alternative which suggested, as the time for ascertaining the value of the dollars, the date of the judgment, namely, November 4, 1897. In support of the claim for interest at 4 per cent. from the date of the judgment, I can see no possible ground. The judgment was not a final judgment for an ascertained sum, and it would be altogether without precedent to grant interest in the circumstances. The claim, however, plainly shews, as do the others, that the account rendered on November 13, 1897, was not accepted as a sufficient settlement of account. As to the first alternative claim which seems to have been most argued in the Court below, as it was on the appeal, it would be sufficient to say that it treats the defendants as having been in default from the death of Mr. Morison, and would be giving the plaintiff the advantage of the delay in taking out administration and in the conduct of the action, which would be plainly unjust.

In addition to this, it proceeds upon an entire misapprehen-

sion of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it.

The notice of appeal drops all the claims for directions contained in the motion before Kekewich J. except the first, and substitutes for the abandoned alternatives one for fixing August 31, 1896, as the day for conversion of the Mexican dollars. It seems to me that a sufficient answer to that claim is that the account shewing a balance to that date was not delivered until November 13, 1897, and, even if accepted on that date, could not have formed the basis of an order at an earlier period. But in truth, as before pointed out, it was not accepted in any sense as a satisfactory account until, at the earliest, during the argument of the appeal motion, so that it would be impossible to give a direction on the new alternative. To the present time there has been no settled account. There is no evidence that the law of Mexico is in any material respect different from our own; so that if the suit had been prosecuted there it would have been impossible to get an order for payment of the balance before November 13, 1897. This shews that there can properly be no question as to an earlier conversion. Quite independently of the cases cited as to conversion into English money of foreign currency, not only was the order of Kekewich J. appealed against quite right, but no order on the substituted alternative could now properly be made, and the only order ought to be that the appeal be dismissed with costs.

VAUGHAN WILLIAMS L.J. I have come to a different conclusion with great hesitation. As the question raised is, in a sense, a question of equity practice, I should have liked on such a question to have deferred to the Master of the Rolls and Rigby L.J., but, as a question of principle is also involved, I think it my duty to stand by and express my own opinion.

The question, and the only question argued before us in this case, has been as to what is the proper mode of taking the account ordered in an action brought in this country by a creditor to have an account taken of moneys payable abroad by the defendant in foreign currency, whether such account

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should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates. It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency, and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—i.e., in practice, according to the rate of exchange existing at the particular time between the currencies.

The only question has been as to what that particular time was. Now I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form in the English courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—i.e., the amount payable according to the rate of exchange. *Scott v. Bevan* (1) is an authority for this mode of computation; and this mode of computation is in accordance with the rate applied on the dishonour of a bill of exchange payable in foreign currency in a foreign country: *Suse v. Pompe*. (2)

It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment. If this is the general rule in actions for the recovery in English courts of

(1) 2 B. & Ad. 78.

(2) 8 C. B. (N.S.) 538.



sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account. Suppose the account had been an account of the number of bushels of maize which the defendants had received in Mexico on account of the plaintiff, the amount payable by the defendants to the plaintiff would have to be fixed according to the value of the maize at the date when the defendants ought to have accounted for the maize in question according to the course of business between themselves and their principal, and it seems to me that the Mexican dollar should be accounted for on the same footing. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commission in dollars became payable; but this would not in my judgment have been a sufficient reason for fixing the amount of the result of the account in English sterling according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case, because the plaintiff is willing that the value shall be taken of the dollars as on August 31, 1896, the date as of which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff.

I only wish to add a word or two as to some of the cases cited. The cases in *Vesey Junior of Cash v. Kennion* (1) and *Cockerell v. Barber* (2), have really but little bearing on the question. In *Cash v. Kennion* (1) the only question to be decided was who was to bear the cost of remittance to England of a debt paid abroad but payable in England. Was the creditor or the debtor? And the Court decided that the debtor must bear the cost of remittance, which cost was a commission to the agent who collected the money for which the defendant had to account to the plaintiff. In *Cockerell v. Barber* (2) Lord Eldon, in an action brought in England to recover a legacy payable in India of "300,000 Sicca rupees" so described in the will, refused to allow the cost of remittance to the plaintiff, but declared that the legacy was to be paid according to the current value of the Sicca rupee in Calcutta. Lord Eldon

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(1) 11 Ves. 314.

(2) 16 Ves. 461.

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seems to have intended by this the real par of exchange. At all events 2s. 1d., which was the rate the defendant successfully urged upon Lord Eldon, does not seem to have been the original relative value of the Sicca rupee to English sterling, for this I believe was 2s. 6d. I think Lord Eldon meant the depreciated value of the rupee in Calcutta. But the main bearing of the case is not on the question of the rate of conversion, but of the date; and as to this Lord Eldon says in so many words in *Cash v. Kennion* (1): "Where a man agrees to pay 100*l.* in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed."

This puts the conversion on the basis of indemnity against damages for breach of contract, and so does *Cockerell v. Barber* (2), according to my understanding of the judgment.

The same view is taken in Sedgwick on Damages, 4th ed. p. 270.

In Story's Conflict of Laws, s. 309, it is said the proper rule would seem to be in all cases to allow that sum in currency which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable calculated by the real par, and not by the nominal par of exchange. By this I understand the learned author to adopt the rule laid down in *Scott v. Bevan*. (3) With regard to this case, I would observe that although the case is a strong authority for treating the value of the foreign currency in English currency as a question of damages—the declaration of the plaintiff and the judgment of the Court both so treating it—I am not sure that the allowance of the interest as from the date of the original debt down to the date of the payment into court in the English action is quite consistent with this view; but be this how it may, there can be no doubt that the Court took, as the measure of value, 160*l.* Jamaica to 100*l.* English sterling. And if this is so, I think it follows that the date for the application of the rate should have been the date of the Jamaica

(1) 11 Ves. 316.

(2) 16 Ves. 461.

(3) 2 B. & Ad. 78.

judgment when the obligation sued on arose, and not the date of the English judgment.

I think that the order of Kekewich J. ought to be amended by declaring that the plaintiff is entitled to have the amount of Mexican dollars found to be due by the account of August 31, 1896, converted into English money sterling at the rate of exchange prevailing between the said currencies on that day. It seems to me that to hold otherwise would make the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure and according as he brings his action in the Queen's Bench Division or in the Chancery Division.

Solicitors: *Angove & Bromwich; Jaques & Co., for S. Wright & Co., Bradford.*

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[1897 B. 4556.]

*Company—Register of Members—Inspection—Right to take Copies—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32.*

The right to inspect the register of members of a company, which is conferred by s. 32 of the Companies Act, 1862, carries with it the right to take extracts from or to make copies of the entries in the register.

The right (also given by the section) to require a copy of the register on payment is in addition to, and not in substitution for, the above implied right.

The "register" includes the entries of the names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or otherwise.

MOTION by the plaintiffs for an interlocutory injunction to restrain the defendant company from preventing the plaintiffs at all reasonable times from having access to the register of shareholders of the defendant company for the purpose of inspection and perusal, and from preventing the plaintiffs from taking extracts from the register of the names, addresses, and holdings of the persons and corporations whose names appeared in the register.

The company was incorporated on February 19, 1894, by registration under the Companies Acts. The articles of association empowered the directors by resolution to forfeit the shares of any member for non-payment of calls. By clause 41, "When any shares shall have been so forfeited notice of the resolution shall be given to the member in whose name they stood prior to the forfeiture, and an entry of the forfeiture, with the date thereof, shall forthwith be made in the register." Clause 44: "Any member whose shares have been forfeited shall, notwithstanding, be liable to pay and shall forthwith pay to the company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment, at the rate of 4 per cent. per annum,

and the directors may enforce payment thereof if they shall think fit."

The plaintiff E. S. Boord was the holder of 1000 shares in the company; but on September 7, 1897, a resolution had been passed by the directors forfeiting his shares for the non-payment of a call. He alleged that the forfeiture was not valid.

The other plaintiff, W. S. Fraser, was the holder of fifty shares.

A committee of shareholders had been formed for the purpose of investigating the affairs of the company, and of defending any proceedings which might be taken against the shareholders for calls. Boord was a member of this committee.

In July, 1897, an application was made to the company, on behalf of the plaintiff Boord and the other members of the committee, for a list of the shareholders in the company. On September 22, 1897, a list was sent by the secretary, but the plaintiff alleged that it was not a complete list. On October 21, 1897, on the application of the plaintiff Boord, Ridley J. made an order that the company should give immediate inspection of the register of members of the company. A clerk of the plaintiffs' solicitors afterwards attended at the company's office and requested the secretary to allow him to take notes from the register. The secretary refused to allow him to do this. The clerk went again to the company's office on October 22 and requested to be allowed to inspect the register. The secretary allowed him to do this; but when he told the secretary that he was going to take notes of the names of those shareholders whose shares had been forfeited, and through whose names a red line had been drawn in the register, the secretary refused to allow him to take such notes, on the ground that the shares of those persons had been forfeited, and their names no longer formed a part of the register. The list which had been supplied by the secretary to the plaintiff did not contain these names, and the secretary refused to supply a copy of them. A similar application was afterwards made by the other plaintiff, and it was refused on the same ground. The action was then commenced, claiming the relief mentioned in the notice of motion.

The secretary of the company made an affidavit in which he

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said that the plaintiff Boord was not the holder of any shares in the company, his shares having been forfeited. He said that the plaintiff Boord had been supplied with a true copy of the list of members of the company, and he submitted that the plaintiff was not entitled to be supplied with, or to take copies of, the names of those persons whose shares had been forfeited, and who were consequently past members of the company, and through whose names a red line had been drawn in the register.

*Swinfen Eady, Q.C.*, and *Stewart-Smith*, for the plaintiffs.  
The right to inspect the register is given by s. 32 (1) of the

(1) Sect. 25: "Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:—

"(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number: And of the amount paid or agreed to be considered as paid on the shares of each member:

"(2.) The date at which the name of any person was entered in the register as a member:

"(3.) The date at which any person ceased to be a member:

"And any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty."

Sect. 26: "Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:—

"(1.) The amount of the capital of the company, and the number of shares into which it is divided:

"(2.) The number of shares taken from the commencement of the company up to the date of the summary:

"(3.) The amount of calls made on each share:

"(4.) The total amount of calls received:

"(5.) The total amount of calls unpaid:

"(6.) The total amount of shares forfeited:

Companies Act, 1862, and this right carries with it the right to take copies. It has been so decided with regard to s. 45 of the Companies Clauses Act, 1845, and s. 28 of the Companies Clauses Act, 1863, and also that the right can be enforced by injunction: *Holland v. Dickson* (1); *Mutter v. Eastern and Midlands Railway Co.* (2); and as to the register of mortgages under s. 43 of the Companies Act, 1862: *Nelson v. Anglo-American Land Mortgage Agency Co.* (3) The entries of the names of persons who have been, but have ceased, by forfeiture or otherwise, to be members of the company are part of the register. This is shewn by s. 25 of the Act. The list and summary mentioned in s. 26 is part of the register, and the summary is to contain the names and addresses of past members. And, indeed, s. 32 speaks of "the register of

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"(7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

"The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies."

Sect. 32: "The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned: Except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or

such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied: If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register."

(1) (1888) 37 Ch. D. 669.

(2) (1888) 38 Ch. D. 92.

(3) [1897] 1 Ch. 130.

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*Vernon Smith, Q.C., and W. Higgins, for the company.*

(1.) As to the plaintiff Boord, the Court of Appeal have held, in *Dawson v. African Consolidated Land and Trading Co.* (1), that his shares have been validly forfeited. He is, therefore, no longer a member of the company, and he is not entitled under s. 32 to inspect the register, except on payment of one shilling. He has not proved that he has tendered the shilling.

[NORTH J. It is too late to take that objection now, after you have dealt with him on the footing that he is entitled to inspect.]

(2.) As to the plaintiff Fraser, he is, no doubt, entitled to inspect the register without charge, but he is not entitled to make notes or to take copies, for s. 32 entitles him to require a copy to be furnished to him on payment. This distinguishes the present case from the cases under the Companies Clauses Acts, for there no right was given to require a copy. And the same observation applies to *Nelson v. Anglo-American Land Mortgage Agency Co.* (2)

The company were asked to furnish a list of the shareholders, and this was done.

NORTH J., after stating the nature of the application, continued:—This application has been resisted by the company—on what ground? The case seems to me completely covered by authority, but for one point which I will mention.

The cases cited shew that when there is a power to inspect the register of members of a company that power carries with it, if there is nothing to negative it, the right to make extracts from the register or to make notes of its contents. That is settled, not merely with respect to the Companies Act, but it is the general law, unless there is something expressly forbidding it in a particular case. The cited cases seem to me perfectly clear about this, unless they can be distinguished from the present case by reason of their not having arisen on s. 32 of the Companies Act, 1862. Sect. 32, which gives power in very wide

(1) Ante, p. 6.

(2) [1897] 1 Ch. 130.

terms to inspect the register, says: "and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of 6*d.* per every hundred words required to be copied." It is said that, inasmuch as the person who is authorized to inspect can have a copy if he likes to pay for it, that excludes the right which would otherwise exist to take notes of such parts as he may require. I do not think it does. He has the right to inspect the register, and with that, I think, the right to take notes of anything which he finds there. And if these notes extend to the taking copies of parts, or possibly even of the whole of the register, I do not see anything that prevents the person who may inspect from doing that, unless, indeed, it is not reasonable or cannot be done within a reasonable time. Looking at the words of the section, the power to call on the company to give a copy of the whole or part of the register is, in my opinion, an additional privilege conferred on the person who has the right to inspect, and I do not think it is meant that he is to have that privilege instead of a right which he would have had without it. He can go and see the register and read it, and take his own notes and copies, and if he likes he can also require the company to furnish him with a full copy of the whole or any part or parts of the register which he desires to have. In my opinion that part of s. 32 does not exclude the right which the inspector would otherwise clearly have had to take notes at the time of his inspection.

Of the two plaintiffs, one—Mr. Fraser—is admitted to be a member of the company, and his right to inspection is clear. But it is said that the other plaintiff—Boord—had no right to inspect, because he is not now a member. He was a member, but his shares have been forfeited, and he has not tendered the shilling necessary to entitle a non-member to inspect. It is, however, clear that he was treated by the company as a person who was entitled to inspect and to have a list of the present members furnished to him, for both these things were conceded to him. After these things have been done and his status has been accepted, it is too late to open a discussion

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NORTH J. upon the point (upon which there is no evidence) whether he tendered a shilling, or whether, if it was not tendered, the tender was waived.

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I will make an order in the terms of the notice of motion, and the plaintiffs must have their costs in any event.

Solicitors: *Wyatt Digby & Co.*; *Burgoyne Watts & Co.*

W. L. C.

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[1898 S. 945.]

March 18, 19,  
 25.

*Local Government—Municipal Corporation—Parliamentary Opposition—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 140, Sched. V., Part II. (12)—“Rights, Privileges, and Duties.”*

An alteration in the price of gas in the district of a municipal corporation, a large consumer for public lighting and otherwise, does not affect its “rights, privileges, and duties” within the principle of the decision in *Attorney-General v. Mayor of Brecon*, (1878) 10 Ch. D. 204.

At the instance of a gas company, suing as ratepayers, a municipal corporation, who had not complied with the requirements of s. 4 of the Borough Funds Act, 1872, was restrained from applying any part of its borough fund (there being no surplus) to the costs of opposition before Parliament to a bill promoted by the gas company which would affect the price of gas.

THIS action was brought by the Attorney-General at the relation of the Swansea Gas Company, and the Swansea Gas Company suing as ratepayers in the borough of Swansea against the corporation of Swansea, to restrain the corporation from paying out of their borough funds the costs of opposition in Parliament to a bill promoted by the Swansea Gas Company, without first having obtained the consent of the owners and ratepayers, and having otherwise complied with the requirements of s. 4 of the Borough Funds Act, 1872 (35 & 36 Vict. c. 91). The action was brought on on motion for an interlocutory injunction.

The Swansea Corporation opposed the bill on, among other grounds, the ground that the bill as introduced contained provisions affecting the price of gas charged to consumers, and



that the corporation were large consumers of gas for the purpose of public lighting and other purposes, and were liable to pay at a price regulated by reference to the scale for general consumers.

This motion was brought on on March 18, and part heard on that day. The hearing was continued on March 19, and not concluded, and the motion stood over till Friday, March 25. In the meantime, on Monday, March 21, the bill was considered by a Committee of the House of Lords. A number of alterations required by the corporation were agreed to by the gas company and inserted in the bill, and, on the other hand, the corporation withdrew some of their requirements. Four points of difference were not agreed to, and were considered by the Committee, and decided in favour of the promoters.

Among the alterations in the bill assented to by the gas company were the insertion of a provision enlarging the limits of a cheaper supply than that enjoyed by consumers outside the borough from an older limit of the borough to the enlarged area of the borough as now existing, the insertion of a clause in respect of the issue of new share capital and loan capital, and various alterations with a view to keep down the price of gas to the consumers generally. The four points dealt with by the Committee of the House of Lords related (1.) to the amount of additional capital authorized, (2.) having a place for testing gas away from the works, (3.) the appointment of an independent auditor, and (4.) the insertion of a clause expressly saving the rights of the corporation.

It was admitted that there was no surplus of the borough fund.

*Swinfen Eady, Q.C., Macmorran, Q.C., and E. Knowles Corrie*, for the gas company. As the defendant corporation have not complied with the requirements of s. 4 of the Borough Funds Act, 1872, that Act has no application. In accordance with the decision of *Reg. v. Mayor of Sheffield* (1), the corporation, in a case where there is no surplus of the borough fund, cannot apply the rates raised for that fund to opposing a bill

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(1) (1871) L. R. 6 Q. B. 652.

NORTH J. in Parliament which merely affects them in the same way that  
 1898 it affects the ratepayers individually. They have no right to  
 ~~~~~ spend the rates in the protection of the ratepayers, or merely in  
 ATTORNEY- order to reduce the price of an article they have to pay for like
 GENERAL other persons. In the *Sheffield Case* (1) the defendant corpora-
 v. tion were consumers of water in the same way as here the
 SWANSEA defendant corporation are consumers of gas. That case was
 CORPORATION. decided on an Act which in this respect was in the same terms
 — as the existing Municipal Corporations Act, 1882. None of the
 grounds of opposition to the bill of the gas company related to
 the special rights, powers, or duties of the corporation, so as
 to bring the case within the principle of *Attorney-General v.*
Mayor of Brecon. (2)

Vernon Smith, Q.C., and *R. J. Parker*, for the defendant corporation. After the decision of the Committee of the House of Lords as to the saving clause, we do not insist that the defendants had a right to oppose the bill for the sake of procuring such a saving clause. We say that the opposition of the corporation has not only benefited the ratepayers generally, but, inasmuch as the corporation have a duty cast on them to light the borough and have to pay large sums for gas supplied to them, anything which affects the price of gas supplied to them affects their corporate rights and duties. They were therefore, within the principle of *Attorney-General v. Mayor of Brecon* (2), entitled to oppose the bill to get the clauses affecting the price of gas cut out.

Swinfen Eady, Q.C., in reply.

NORTH J., after stating facts:—The only ground on which it is now urged that the corporation had a right to oppose the bill of the gas company and use the borough fund for that purpose is that there were provisions in the bill that interfered with, or might interfere with, the sum they would have to pay in respect of the supply of gas by the plaintiff company, the relators, to them and to the other inhabitants of the town. The rights of a corporation to oppose a bill in Parliament out of the borough funds under the Municipal Corporations Act,

(1) L. R. 6 Q. B. 652.

(2) 10 Ch. D. 204.

1835, was the subject of considerable discussion in the case of *Reg. v. Mayor of Sheffield* (1), which has been referred to. In that case the learned judges of the Court of Queen's Bench came to the conclusion that certain steps which were taken by the corporation, however meritorious and proper in themselves, were not of such a character that the corporation were justified in paying the expenses of those proceedings out of the borough fund; and the following year, no doubt in consequence of that decision, an enabling Act was passed—the Borough Funds Act of 1872. [His Lordship stated the effect of ss. 2 and 4 of the Borough Funds Act, 1872, and said:—] As the preliminaries or formalities provided for by the latter section have not been complied with, the corporation do not get any benefit from the Act. Sect. 8 of the Act preserves the rights of the corporation as they would have existed had the Act not been passed, so that nothing really turns on the Act itself. There is a saving clause preserving former rights, but that does not give them any new right.

Now, when we come to consider the various grounds which were put forward as justifying the opposition by the corporation to the bill, the only one that has been urged before me to-day is this—that the effect of the bill was to alter certainly or possibly the amount that the corporation might have to pay in respect of their gas. Is that a matter with respect to which the words of the saving clause (s. 8) have any application? I do not think they have. I think that the case of *Reg. v. Mayor of Sheffield* (1) is a very strong authority on that. It is a case which led to a change in the law, but a change which has not been utilized on this occasion. But I wish to refer more particularly to the decision of Sir George Jessel in *Attorney-General v. Mayor of Brecon*. (2) I should say before doing that that this question of payment is merely this. According to the law as it now stands, the corporation have to pay for all gas supplied to them for the lighting of the streets and their own buildings, and the means of fixing the amount to be paid is provided by the 24th section of the Gasworks Clauses Act, 1871. It provides that the undertakers shall supply gas to

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any public lamps at such times as they are required to do so at a price to be settled by agreement between the local authorities and the undertakers, and in case of difference by arbitration, regard being had to the circumstances of the case and the price charged to private consumers in the district. Now, it was proposed in the bill as brought forward that there should be an alteration in the mode of charging for gas. It was proposed to introduce what was called a sliding scale, by which, instead of there being a fixed maximum amount payable by way of dividend, the dividend might be increased in a certain ratio having regard to a diminution in the price to be charged to customers. That did not affect the corporation directly under the section I have just referred to, but it affected them in that on any arbitration to fix the amount to be paid the price which private consumers were charged was to be taken into consideration. Is there then any right of the corporation with respect to the supply of gas which would have been interfered with or taken away by the bill if it had been passed in the form in which it was introduced? I think there clearly is not. That right to have the price fixed by arbitration was not proposed to be touched in any way. In my opinion, there was no right attacked which the corporation could defend either under the old law existing prior to the passing of the 1872 Act, or saved by the operation of s. 8 of that Act.

The principle applicable was discussed fully before Sir George Jessel in *Attorney-General v. Mayor of Brecon*. (1) In that case there was threatened interference with the rights of the corporation in respect of the market-house, the market-place, the regulation of the tolls, the existence and the situation of slaughter-houses, and otherwise: but I do not think it worth while to dwell upon the special facts of that case. The view the Master of the Rolls took was that, independently of the provisions of s. 92 of the Municipal Corporations Act, 1835, a corporation that was attacked had a right to defend itself, and he went into various points dealing with their position, and indicating in what way such right of defence existed. First of all, he referred to the possibility of some attempt being made

(1) 10 Ch. D. 204.

actually to destroy the corporation itself. He pointed out that was a thing they would be perfectly justified in resisting. Then there was another way in which it might have been attacked. There might be an attempt to revoke its charter. That, again, he pointed out as a matter of course they must have a right to resist. Then he said (1): "What is the principle upon which corporations should be allowed to defend themselves? There are decisions which go expressly to defending their property from attack and defending their existence from attack. Does not the principle go further? The existence of a municipal corporation is an existence not simply for the purpose of affixing a seal, but for the purpose of the government of the town; and therefore if their duties and rights of government are interfered with, their existence is to that extent interfered with, though it is not the actual existence of the corporation. It is the existence of their corporate powers which in fact goes to make up the entire existence of a corporation; and it appears to me that a corporation has the right to defend its powers when attacked, upon the same principle that it has the right to defend its actual existence from attack." Then, after some remarks upon the particular topics which were the subject of decision in that case, he says: "Is it to be supposed that an individual or a company can present a bill to Parliament for taking away those privileges and duties of the corporation, and that the corporation shall have no power of defending itself, shall have no right to expend the money necessary for defending its privileges and duties as a corporation? It appears to me that the mere statement of the question shews that there is no valid distinction between the right of property—which, after all, is only held by the corporation as trustee for public purposes—and the powers and privileges, forming a larger or possibly a smaller share of the government of the town which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that, on principle, you must imply a right in the corporation to defend itself from such an attack." A little further on he said: "The right of a corporation to

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NORTH J. defend itself from an attack of this kind extends not merely to property—not merely to the existence of the corporation in the smallest sense, that is, to the continued existence of the corporation as such, but to its existence also in the larger sense, that is, to the existence of the corporation with all its rights and privileges; and that an attack on a substantial portion of its privileges, rights, and duties, is as much within the purview of the authorities as an attack on its property or its mere existence.” Then again, after reviewing authorities, he said, some pages further on (1): “It seems to me, therefore, looking at the authorities, that whether we take the one view or the other—whether we consider that under the words ‘expenses necessarily incurred,’ or similar words, used in the Act, this incidental expenditure is included; or whether we consider that the general law as to the rights of trustees defending their property and privileges remains unaffected—in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament.” Then he referred to the Borough Funds Act, but said very little about it, because it was entirely outside the case he had to deal with. Then he added: “I now come to the circumstances of the case, and I must say I think it a very strong case, and quite distinguishable from all the cases to which I have been referred; because in this case the corporation had a special series of powers and duties, which were very much interfered with by the bill in question.” Then he devoted some pages to dealing with those specific and special matters and details which I need not read, and I will only refer to a passage near the end of the judgment, in which he says (2): “I think I have said enough to shew that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases I have been considering. It really comes much closer to the other class of cases, namely, where an action is brought against the corporation to recover from it a part of its property, or to deprive it of a part of its privileges.”

(1) 10 Ch. D. 223.

(2) 10 Ch. D. 227.

Now, do the powers of the corporation, as fully set out and defined there, include the power to oppose a bill because it contemplates an alteration in the rate to be charged for gas, the existing law, which was not proposed even to be interfered with by the bill, being that the price to be paid by the corporation is a subject-matter for arbitration? It seems to me that it would be ridiculous to say that a bill proposing to alter the scale, but leaving the right to settlement by arbitration untouched, would be an attack on a substantial portion of the privileges, rights, or duties of the corporation of Swansea.

Under these circumstances I am of opinion that the expenditure of the borough funds in opposition to the bill is not justified.

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Solicitors for plaintiffs: *R. W. Cooper & Sons.*

Solicitors for defendants: *Sharpe, Parker & Co.*

D. P.

STIRLING J. *In re* STOCKPORT RAGGED, INDUSTRIAL AND
REFORMATORY SCHOOLS.

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Jan. 12;
March 19.

Charity—Jurisdiction of Charity Commissioners—Exemption from—“Any Cathedral, Collegiate, Chapter, or other Schools”—Ejusdem generis Rule—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66.

The proviso at the end of s. 62 of the Charitable Trusts Act, 1853, excluding from the exemption contained in that section “any cathedral, collegiate, chapter, or other schools,” does not extend to all schools of whatever description, but only to the schools mentioned and others of a similar kind.

THIS was a petition presented by the trustees of the above-named charity under the provisions of Sir S. Romilly’s Act (52 Geo. 3, c. 101), asking for the sanction of the Court to a proposed mortgage of part of the property vested in the trustees. The Stockport Industrial Schools were established by a trust deed in 1866, the school buildings being conveyed to trustees upon trust to permit them to be used as a ragged, industrial and reformatory school under a committee of management. The trustees were empowered to sell the original buildings and apply the proceeds of sale in providing larger schools. The petition stated that the situation of the schools was now unsuitable, and the buildings were too small for the purposes of the trust. Notice had been given by the Government inspectors that unless the buildings were enlarged the number of children must be reduced. Under these circumstances the trustees proposed to sell the existing buildings and apply the proceeds, together with other moneys in hand and a further sum to be raised upon mortgage, in buying a new site and building larger schools.

The income of the charity was derived from a Government grant, contributions from school boards, boards of guardians, and other public authorities, subscriptions from residents in the neighbourhood, and the earnings of the school children in their industrial occupations. From the evidence it appeared that all donations or bequests made to the schools were applicable by the committee of management in aid of the voluntary

contributions which constituted their main support, and that STIRLING J. every donation or legacy had been so applied.

The school buildings had been erected partly by means of subscriptions and partly out of funds derived from legacies or voluntary donations. Part of the property which was proposed to be mortgaged was described as the girls' school, and was built on a piece of leasehold land held by the trustees at a rent of 20*l.* per annum. It was appropriated for the purposes of a ragged, industrial and reformatory school for girls.

The petition came before the Court on November 6, 1897, when his Lordship gave the necessary sanction (1), but at that time the Charity Commissioners had not been served with notice of the petition and did not appear. At the request of the Attorney-General they were afterwards served with the petition, and on December 1, 1897, they applied to the judge to stay the drawing up of the order which had been made in order that they might have an opportunity of submitting that the presentation of the petition required their sanction under s. 17 of the Charitable Trusts Act, 1853. The drawing up of the order was accordingly stayed, and the petition now came on again for further argument, and was opposed on behalf of the commissioners.

Vaughan Hawkins, for the Charity Commissioners. The property proposed to be mortgaged is clearly an endowment within the meaning of s. 66 of the Charitable Trusts Act, 1853, and is subject to the jurisdiction of the commissioners, whose sanction to the mortgage is therefore necessary: *In re Clergy Orphan Corporation* (2); *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton*. (3)

The proviso to s. 62 excludes the charity from the exemption contained in that section. The proviso extends to all schools of whatever kind, and not only to a particular class of school. In the construction of statutes the ejusdem generis rule is to be applied with caution, because it implies a departure from the natural meaning of words in order to give them a meaning

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(1) W. N. (1897) 156.

(2) [1894] 3 Ch. 145.

(3) (1860) 27 Beav. 651.

STIRLINGJ. which may or may not have been the intention of the Legislature: *Smelting Co. of Australia v. Commissioners of Inland Revenue*. (1)

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There is nothing to cut down the meaning of the words "other schools" in the proviso: *Fenwick v. Schmalz*. (2)

Grosvenor Woods, Q.C., and *H. Johnston*, for the petitioners. First we say that this is not an endowed charity at all. An endowed charity is one which possesses an income producing endowment: *In re Clergy Orphan Corporation*. (3)

But further we submit that the expression "other schools" in the proviso to s. 62 is limited to schools ejusdem generis with those previously mentioned. It does not include every kind of school. If the Legislature had intended to shut out all schools from the exemption that intention might easily have been expressed by saying that the exemption should not extend to any school whatever. In the construction of statutes general terms following particular ones apply only to such persons or things as are ejusdem generis: *Gunnestad v. Price* (4); *Fenwick v. Schmalz* (2); *Davidson v. Burnand* (5); *Reg. v. Portugal* (6); *Withington Local Board v. Corporation of Manchester* (7); *Sun Fire Office v. Hart* (8); *Smelting Co. of Australia v. Commissioners of Inland Revenue* (9); *Powell v. Kempton Park Racecourse Co.* (10); *Sandiman v. Breach* (11); *Reg. v. Cleworth*. (12)

Before the passing of this Act there had been litigation as to Magdalen College School, and the Legislature intended to deal with a particular class of schools. It is for the commissioners to shew that there is no other kind of school which would justify the application of the ejusdem generis rule. The proviso to s. 62 does not qualify all the exemptions in that section. "The said exemption" must mean the first exemption only, namely, the universities, or any cathedral or collegiate church or place of worship. It cannot be read as extending to all the

(1) [1897] 1 Q. B. 175, 182.

(2) (1868) L. R. 3 C. P. 313.

(3) [1894] 3 Ch. 145.

(4) (1875) L. R. 10 Ex. 65, 70.

(5) (1868) L. R. 4 C. P. 117.

(6) (1885) 16 Q. B. D. 487.

(7) [1893] 2 Ch. 19.

(8) (1889) 14 App. Cas. 98, 103.

(9) [1897] 1 Q. B. 182.

(10) [1897] 2 Q. B. 242.

(11) (1827) 7 B. & C. 96.

(12) (1864) 4 B. & S. 927.

exemptions in the section, otherwise it would include Roman Catholic schools, which was obviously not the intention of the Legislature. It is said that there is no express authority upon this point, but that may be because no one has yet been found with sufficient temerity to argue it; but see *In re Wilson's Will* (1), where the point was obvious and would have been taken if considered tenable. Also in *In re Sir R. Peel's School* (2) the question turned on ss. 62 and 66, and the point was not taken although on the threshold of that case. In *Finnis to Forbes* (3) the commissioners were not represented. This is the first time that it has been contended that all schools throughout the country are within the jurisdiction of the commissioners.

H. Greenwood, for the respondents other than the Charity Commissioners, referred to *In re Shrewsbury Grammar School* (4); *In re Bradford School of Industry*. (5)

Vaughan Hawkins, in reply. The question in *In re Sir R. Peel's School* (2) turned entirely on s. 66, and not on s. 62 at all. It was impossible that the point could have arisen there. So also in *In re Wilson's Will*. (1)

The whole argument is based upon the application of the ejusdem generis rule. In most of the cases the word is vague in its meaning. Here the word "school" is definite, having regard to the scope of the Act. Sect. 66 gives the limitation, and there is nothing to cut down the word "school" any further than it is limited by s. 66. I protest against the view that the point must be treated as concluded from the fact of its not having been hitherto raised. The jurisdiction of the commissioners applies, and they could have granted this application without coming to the court. They have no desire to interfere with what has been done.

Ingle Joyce, for the Attorney-General.

Cur. adv. vult.

Mar. 19. STIRLING J. (after stating the facts):—The property which is proposed to be included in the mortgage appears to

(1) (1854) 19 Beav. 594.

(3) (1883) 24 Ch. D. 591.

(2) (1868) L. R. 3 Ch. 543.

(4) (1849) 1 Mac. & G. 324.

(5) W. N. (1893) 60.

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STIRLING J. be an "endowment" within the meaning of s. 66 of the Charitable Trusts Act, 1853, which enacts that the expression "endowment" means and includes "all lands and real estate whatsoever, of any tenure and all personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity or for all or any of the objects or purposes thereof." It was decided by the Court of Appeal in *In re Clergy Orphan Corporation* (1) that those words must receive their natural meaning, and that all property of every description belonging to or held in trust for a charity, whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to income, is an "endowment" within the meaning of the Act. Sect. 62 of the Act, however, contains certain exemptions from the jurisdiction, and amongst others the following: "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act." It was also decided, in the case referred to, that where a charity is maintained partly by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift are exempt, and that such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body. That decision would govern the present case were it not that s. 62 contains the following proviso: "Provided always, that the said exemption

(1) [1894] 3 Ch. 145.

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shall not extend to any cathedral, collegiate, chapter, or other schools." It is contended on behalf of the Charity Commissioners that that proviso excludes all schools from the exemption found in s. 62. The trustees, on the other hand, contend that only cathedral, collegiate, and chapter schools and other schools of a similar kind are so excluded. It does not appear to me that between these two contentions there is any tenable position, and I have come to the conclusion that the narrower construction ought to prevail. My reasons are these: The charities enumerated in s. 62 are of an extremely miscellaneous kind:—

(1.) The Universities of Oxford, Cambridge, London, and Durham, and colleges or halls in the Universities of Oxford, Cambridge, and Durham. (2.) Any cathedral or collegiate church. (3.) Buildings registered as places of meeting for religious worship. (4.) Roman Catholic charities. (5.) Queen Anne's Bounty, British Museum, friendly or benefit societies. (6.) Any institution, establishment, or society for religious or other purposes, or auxiliary or branch associations connected therewith maintained by voluntary subscriptions, &c. (7.) Mixed charities. (8.) Funds of missionary societies not within the limits of England and Wales.

Now, looking at the extensive class of charities mentioned, if the intention was that all such charities should be excluded from the exemption so far as they consisted of schools, it would have been easy and more natural to express that meaning by saying simply, "Provided that the said exemption shall not extend to any school whatever." The draftsman, however, does enumerate certain kinds of schools, and begins with cathedral schools, passing by, at least for the moment, schools connected with the universities or colleges therein. I am not aware that any of the universities has a school connected with it; but it is well known that there is a school connected with Magdalen College, Oxford. He next mentions collegiate and chapter schools. The word "collegiate" is found in the earlier part of the section, in immediate connection with the word "cathedral" where any "collegiate or cathedral church" is spoken of. The word "chapter" does not occur in

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STIRLING J. the earlier part of the section. "Cathedral" and "chapter" both relate to ecclesiastical foundations; and "collegiate" may have a like signification. A "collegiate" school may mean a school connected with a collegiate church—such a school as is referred to in s. 14, sub-s. 2, of the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), which speaks of "schools" wholly or partially maintained out of the endowment of any cathedral or collegiate church, or forming part of the foundation of any cathedral or collegiate church. Of such a church and school a conspicuous example is, or at all events down to the passing of the Public Schools Act was, to be found in the Abbey and St. Peter's College at Westminster. Standing as it does between the words "cathedral" and "chapter," it seems to me more natural that it should be used in this sense than as designating a school connected with a college in one of the universities. Then, as the draftsman proceeded to refer to chapter schools, chapters not having been spoken of before, he naturally introduced the word "other" to sweep in any schools connected with ecclesiastical foundations not properly designated as cathedral, collegiate, or chapter schools.

I may add that if the argument on behalf of the Charity Commissioners' were well founded Roman Catholic schools must, down to the passing of the Roman Catholic Charities Act in 1860, have been subject to the jurisdiction of the commissioners, a result which seems hardly in accordance with the legislation on the subject of those charities.

Solicitors: *Andrew, Wood & Purves, for John W. Johnston, Stockport; Clabon; Treasury Solicitor.*

G. A. S.

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In re KECK AND HART'S CONTRACT.

STIRLING J.

Settled Land—Settlement created by Will—Jointure Deeds executed by Successive Tenants for Life under Powers conferred by the Will—Sale by Tenant for Life under Settled Land Acts—Appointment of Trustees of Compound Settlement consisting of Will and Jointure Deeds—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 20—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4.

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By a will real estate was devised to A. for life with remainder to his first and other sons successively in tail male, with like remainders to B. and C. and then over. A. and C. were dead, and B. was tenant for life in possession. A., B., and C. had all executed jointure deeds under a power conferred by the settlement; that executed by A. was in operation and constituted an existing charge on the settled property. Trustees of the will had been appointed for the purposes of the Settled Land Acts. B. having contracted, under the powers conferred upon him by those Acts, to sell a portion of the estate, the purchaser insisted that trustees should be appointed of the compound settlement created by the will and the several jointure deeds :—

Held, (1.) that the jointures were not charges upon the estate of the tenant for life within the meaning of s. 4 of the Settled Land Act, 1890; (2.) that the will by itself constituted a settlement within the meaning of s. 2 of the Settled Land Act, 1882; (3.) that under s. 20 of the same Act B. could convey the land discharged from the jointures, they being “estates, interests, or charges subsisting under the settlement” within that section; and consequently that B. could make a good title to the property, and the trustees of the will could give a good discharge for the purchase-money.

In re Tibbits’ Settled Estates, [1897] 2 Ch. 149, and *In re Meade’s Settled Estates*, [1897] 1 I. R. 121, distinguished.

SUMMONS under the Vendor and Purchaser Act, 1874, raising the question whether the vendor, selling under the powers conferred by the Settled Land Acts certain property of which he was tenant for life under a settlement created by a will, was bound to procure the appointment of trustees, for the purposes of the Settled Land Acts, of a compound settlement created by the will and certain jointure deeds executed in exercise of powers conferred by the will.

By his will dated September 30, 1859, George Anthony Legh Keck devised certain real estate to the use of the Hon. Henry Littleton Powys-Keck during his life, with remainder

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The will conferred upon every tenant for life thereunder the power of appointing by deed or will to any woman whom he might marry in case she should survive him an annuity during her life not exceeding 1000*l.* a year. This power was exercisable by a tenant for life either before or after he should come into possession, but no jointure was payable unless either the person exercising the power should be, or become entitled to be, in possession, or some issue of his should, or if of full age would, become so entitled.

The testator died on September 4, 1860.

By an indenture dated July 15, 1862, Henry Littleton Powys-Keck demised the property devised to him by the will to trustees for the term of ninety years, if he should so long live, upon trust during the joint lives of himself and his wife, to raise and pay to his wife out of the rents and profits the annual sum of 400*l.* by way of pin-money; and by the same indenture he exercised his power of jointuring in favour of his wife.

Henry Littleton Powys-Keck died on July 10, 1863, leaving his widow surviving, and she was still living. Upon his death Harry Leycester Powys-Keck became tenant for life in possession, subject to the jointure in favour of the widow of Henry Littleton Powys-Keck. Charles Horatio Gardiner Powys-Keck died on March 9, 1870, without ever having been married.

By an indenture dated October 22, 1870, Thomas Bancho Powys-Keck exercised his power of jointuring, and on November 27, 1877, he died, leaving his widow and two sons surviving, all of whom were still living.

By an indenture dated July 23, 1891, Harry Leycester

Powys-Keck also exercised his power of jointuring in favour of STIRLING J. his wife.

By an order of the Chancery Division dated April 20, 1887, the Hon. Montague Curzon and Thomas Henry Burroughs were appointed trustees under the settlement created by the will of the testator for the purposes of the Settled Land Act, 1882.

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By an agreement dated July 31, 1897, Harry Leycester Powys-Keck, in exercise of the powers conferred upon him by the Settled Land Act, 1882, contracted to sell to Sir Israel Hart a portion of the settled property in fee simple free from all incumbrances.

The purchaser took the objection that the three jointure deeds formed with the will one compound settlement, and sent in a requisition calling upon the vendor to procure trustees for the purposes of the Settled Land Acts to be appointed of that compound settlement.

The vendor declined to comply with the requisition, and took out this summons asking for a declaration that the purchaser was not entitled to insist upon the requisition.

*Buckley, Q.C.*, and *E. P. Hewitt*, for the summons. It is contended on behalf of the purchaser that trustees must be appointed, for the purposes of the Settled Land Acts, of a compound settlement created by the will and the several jointure deeds, and for that contention reliance is placed on *In re Tibbits' Settled Estates* (1) and *In re Meade's Settled Estates*. (2) We submit that s. 4 of the Settled Land Act, 1890, only applies to deeds creating charges on the life estate. The jointure deeds do not create any such charge. Here the will constitutes the settlement, and the jointures are created under the will. *In re Tibbits' Settled Estates* (1) was not a contested case, and North J. simply followed *In re Meade's Settled Estates*. (2) Moreover, it does not appear to have been brought to his notice that in that case there was a charge of pin-money affecting the life estate which brought the case within the language of the Act of 1890. That case also was not argued

(1) [1897] 2 Ch. 149.

(2) [1897] 1 I. R. 121.

STIRLING J. adversely. The Court did, no doubt, for convenience appoint trustees of the compound settlement, but it does not follow that it was necessary. The object of the Settled Land Acts was to facilitate the dealing with settled estates: see *Bruce v. Marquis of Ailesbury*. (1)

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This case is not like *In re Marquis of Ailesbury and Lord Iveagh* (2), where there were several settlements and resettlements. Here there is only one settlement created by the will, and the trustees of that instrument are trustees for all parties. There is really no decision on the point except the case of *In re Knowles' Settled Estates* (3) which supports the vendor's contention. The question is not whether the Court has power to appoint trustees in this case, but whether the vendor can make a good title to the property without its being done.

If the decisions in *In re Tibbits' Settled Estates* (4) and *In re Meade's Settled Estates* (5) are correct a tenant in tail may by barring his estate tail, and resettling his base fee, perhaps without the knowledge of the tenant for life, render it difficult for the tenant for life to exercise his statutory powers. The inconvenience created by these decisions is extreme. Prior to 1882 every properly drawn settlement contained a power of sale overriding powers of jointuring and charging portions. Since that time conveyancers have omitted such provisions, relying upon the statute; but now, if these decisions are upheld, it will be necessary in every case of the kind to apply to the Court to appoint trustees of the compound settlement containing the powers and the deed by which the powers were exercised, thus increasing the difficulty and expense of dealing with settled land, and, to that extent, defeating the object of the Acts.

[They referred also to *Vine v. Raleigh* (6), to Hood and Challis on the Settled Land Acts, 5th ed., Introduction and p. 316, and to the following sections of the Settled Land Acts, namely, Settled Land Act, 1882, s. 2, sub-ss. 1, 8; ss. 20, 38, sub-s. 1; s. 45, sub-s. 1; ss. 50, 51, sub-s. 1; Settled Land Act, 1890, s. 4.]

(1) [1892] A. C. 356, 361.

(2) [1893] 2 Ch. 345.

(3) (1884) 27 Ch. D. 707.

(4) [1897] 2 Ch. 149.

(5) [1897] 1 I. R. 121.

(6) [1896] 1 Ch. 37.

*S. A. Sampson*, for the purchaser. The purchaser is a STIRLING J. willing one, and only wants a good title. Having regard to the decisions in *In re Meade's Settled Estates* (1) and *In re Tibbits' Settled Estates* (2), the purchaser would have been unwise not to take the objection. It is not clear that a deed exercising a power conferred by a settlement is not one of the instruments under or by virtue of which the land stands limited. The question is, what is the settlement in this case? If it is the will plus the jointure deeds, then trustees of that compound settlement must be appointed.

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STIRLING J. If I thought that I were really going to decide anything contrary to the expressed opinions of the Master of the Rolls in Ireland or North J., I should take time to consider my judgment, and possibly I should decide, in deference to their opinion, though contrary to my own, and let the matter go to the Court of Appeal. But I do not think I am called upon so to decide. The point which comes before me is a different one to that which either of these learned judges had to consider in the case before him. Now, the matter stands in this way. By a will real estate was devised in strict settlement, that is to say, it was devised to legal uses in favour of A. for life, with remainder to his first and other sons in tail male, with remainder to B. for life, with remainder to his first and other sons in tail male, with remainder to C. for life, with remainder to his first and other sons in tail male, and then over. A. and C. are dead; B. is still living. A., B., and C. all executed jointure deeds under a power conferred by the settlement. That executed by A., the first tenant for life, is now in operation and constitutes a charge on the property. Those executed by B. and C. do not constitute existing charges, but they may hereafter come into operation. Now B., the present tenant for life, has, under the powers conferred by the Settled Land Acts, contracted to sell a portion of the property devised by the will. Objection has been taken by the purchaser that, although there are existing trustees of the will for the purposes of the Settled Land Acts, it is necessary that

(1) [1897] 1 I. R. 121.

(2) [1897] 2 Ch. 149.

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STIRLING J. there should be appointed trustees for the purposes of the compound settlement consisting of the will and the three several jointure deeds which have been executed. The ground of that requisition is to be found in the two cases which have been referred to, namely, *In re Meade's Settled Estates* (1), before the Master of the Rolls in Ireland, and *In re Tibbits' Settled Estates* (2), before North J. Now, certainly in the case before North J., and possibly also in *In re Meade's Settled Estates* (1), a question arose which I have not to consider. In the case before North J. there were four deeds which created charges on the interest of the tenant for life, and North J. was of opinion that, having regard to the provisions of s. 4 of the Settled Land Act, 1890, he had the power to appoint trustees of the compound settlement arising under the original settlement and these four deeds. That turned on the wording of s. 4 of the particular Act, which provides that "Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of s. 50 of the Act of 1882."

It is possible, for the facts are not very clearly stated in the report of *In re Meade's Settled Estates* (1), that the same thing happened in that case. But here I have nothing to do with any charge upon the estate of the tenant for life. One of the jointure deeds did create a charge in the shape of pin-money during the life of the tenant for life. But the tenant for life is now dead, and that charge has, therefore, come to an end, and there is no charge subsisting except the jointures. The question which I have to consider is not whether, under s. 38, there is or is not jurisdiction under these circumstances to appoint trustees of the so-called compound settlement, but whether the tenant for life, having contracted to sell, can make a good title to the purchaser although trustees are not so appointed.

(1) [1897] 1 I. R. 121.

(2) [1897] 2 Ch. 149.



Upon that I must simply go to the Act itself. There is no decision precisely in point, and I, therefore, have to consider the operation and effect of the enactments contained in the Settled Land Acts. The first clause to be considered is s. 2 of the Act of 1882, which runs thus: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes (1) of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

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Now, what do we find here? Under the will at the present moment the property is held for B. for life with remainders over. The lands devised by the will therefore stand "limited to or in trust for persons by way of succession." The will, therefore, alone, without looking at the jointures, constitutes by itself a settlement within the meaning of the Act, and B. is the tenant for life. That being so, what can the tenant for life convey to the purchaser from him? For that I go to s. 20. That section says: "On a sale . . . the tenant for life may, as regards land sold . . . convey . . . the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale. . . ." Therefore he may convey the land "for the estate or interest" which is "the subject of the settlement"; that is, admittedly, the fee simple. Then the operation of the deed is defined by sub-s. 2, which is as follows: "Such a deed . . . is effectual to pass the land conveyed . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder. . . ." Therefore, B., the tenant for life, can convey the lands "discharged from the limitations, powers, and provisions of the settlement," and, more than that, "from all estates, interests, and charges

(1) *Sic.*

STIRLING J. subsisting or to arise thereunder." Can the tenant for life, then, under these words convey discharged from the jointures?

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It seems to me plain that he can. The jointures constitute estates, interests, or charges subsisting under the settlement; it is not necessary for me to say which. This is made still stronger when we examine the exceptions which follow: "All estates, interests, and charges having priority to the settlement." The jointures are not "estates, interests, or charges having priority to the settlement"; they arise under or by virtue of the settlement. Then the second exception is this: "All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed." That is an important exception. If, for example, the settlement contained a power to charge portions, and those portions had been provided for by a mortgage of the property or the creation of a term or interest in the property, and such portions had been actually raised, then I apprehend they would fall within this exception. But the inference is strong that when not actually raised the portions may be overridden, because the exception does not extend to anything but estates, interests, and charges which have been "conveyed or created for securing money actually raised at the date of the deed." A jointure does not fall then within that exception. Then the third exception is this: [His Lordship read it, and continued:—] It seems to me that under that section the tenant for life may make a good title. I find nothing in the Act to suggest that the trustees appointed for the purposes of the Act were to lose their powers when a tenant for life saw fit to execute the powers of charging a jointure or portions: and it follows that trustees appointed for the purposes of the will may give a good discharge for the purchase-money which will be paid by the purchaser. Under these circumstances I think the vendor has shewn a good title, and that on the summons I ought to declare that the requisition has been sufficiently answered, and cannot be insisted on.

Solicitors: *Preston, Stow & Co., for R. B. Berridge & Sons, Leicester; Field, Roscoe & Co., for Storey, Leicester.*

*In re* GIBBS.  
THORNE *v.* GIBBS.

[1896 G. 1179.]

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March 24.

*Revenue—Estate Duty—Settlement Estate Duty—Incidence—Finance Act, 1894*  
(57 & 58 Vict. c. 30), ss. 5, 22—*Finance Act, 1896* (59 & 60 Vict. c. 28),  
ss. 19, 24, 39.

Sect. 19 of the Finance Act, 1896, is not retrospective; consequently the settlement estate duty leviable in respect of a legacy settled by the will of a person dying after the commencement of the Finance Act, 1894, but before the commencement of the Finance Act, 1896, is still payable out of residue in accordance with *In re Webber*, [1896] 1 Ch. 914.

RICHARD GIBBS, who died on May 31, 1896, by his will dated December 2, 1892, bequeathed a sum of 150,000*l.* upon certain trusts for the benefit of his widow, his daughter, and his granddaughter, and he also bequeathed one moiety of his residuary personal estate upon trust for certain charities.

The testator's estate was being administered by the Court in an action brought by the trustees and executors of his will.

Pursuant to an order made on the further consideration of the action, settlement estate duty to the amount of 154*l.* 4*s.* 8*d.* had been paid upon the legacy of 150,000*l.* out of a balance certified to be due from the plaintiffs in respect of the testator's personal estate, but without prejudice to the question out of what fund this duty should ultimately be paid. A summons was now taken out by the plaintiffs upon the second further consideration of the action to determine the question whether the duty should be borne by the settled legacy or by the residuary personal estate.

*Buckley, Q.C.*, and *Medd*, for the summons. The question turns upon the construction to be placed upon the Finance Act, 1894, and the Finance Act, 1896. (1)

(1) Part I. of the Finance Act, 1894, provides as follows:—

Sect. 5 (1.): "Where property in respect of which estate duty is leviable, is settled by the will of the deceased . . .

"(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter

STIRLING J. Part I. of the Act of 1894 by s. 1 imposed a new duty called  
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 “estate duty” upon the property of persons dying after the commencement of that part of the Act, and by s. 5 imposed a further duty called “settlement estate duty” on property “settled by the will of the deceased.” Under this Act it was held by North J. in March, 1896, that the settlement estate duty imposed by s. 5 ought to be borne, not by the settled legacies, but by the general residue: *In re Webber*. (1) On August 7 of the same year the Act of 1896 was passed, and by Part IV., s. 19, it was provided that the settlement estate duty leviable in respect of a legacy “settled by the will of the deceased” should be payable out of the settled legacy in exoneration of the residue. A difficulty has arisen in consequence of the interpretation clauses of the two Acts. Sect. 22 of Part I. of the Act of 1894 defines the expressions “deceased person” and “the deceased” as a person dying after the commencement of that part of the Act. Sect. 24 of Part IV. of the Act of 1896 contains a similar definition (*mutatis mutandis*) of “deceased person,” but it does not mention the expression “the deceased”; and s. 39 provides that Part IV. of the Act shall be construed together with Part I. of the Act of 1894.

specified” (except as therein mentioned).

Sect. 22 (1.): “In this part of this Act, unless the context otherwise requires—

“(a) The expressions ‘deceased person’ and ‘the deceased’ mean a person dying after the commencement of this part of this Act.”

Part IV. of the Finance Act, 1896, provides as follows:—

Sect. 19 (1.): “The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased’s estate.”

Sect. 24 (1.): “Unless the context otherwise requires—

“(a) this part of this Act shall come into operation on the first day of July one thousand eight hundred and ninety-six, which day is in this part of this Act referred to as the commencement of this part of this Act; and

“(b) the expression ‘deceased person’ means a person dying after the commencement of this part of this Act.”

Sect. 39 provides as follows:—

“Part Four of this Act shall be construed together with Part One of the Finance Act, 1894.”

(1) [1896] 1 Ch. 914.

The question is whether upon the true construction of s. 22 of the Act of 1894 and ss. 24 and 39 of the Act of 1896, s. 19 of the later Act has or has not any retrospective operation.

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*Upjohn, Q.C.*, and *Rashleigh*, for the widow. It is difficult to contend that s. 19 of Part IV. of the Act of 1896 is retrospective in the face of s. 24, sub-s. 1 (a), which provides that that part of the Act shall commence on July 1, 1896. As to all persons dying before that date, *In re Webber* (1) still applies.

There is no difference in meaning between the expressions "deceased person" and "the deceased," and they are included in the same definition in the Act of 1894. It is a mere quibble to say that the definition in s. 24 of the Act of 1896 does not fit the language of s. 19. If the Legislature had intended the Act to be partly retrospective and partly not, it ought to have said so in plain terms, and the Court will not adopt a strained construction of the Act for the purpose of bringing about that result: *Lauri v. Renad*. (2)

The point has been decided by the Vice-Chancellor of the County Palatine in the way for which we contend: *Jones v. Bennett*. (3)

*Grosvenor Woods, Q.C.*, and *R. J. Parker*, for the daughter and granddaughter in the same interest, referred to Maxwell on the Interpretation of Statutes, 3rd ed. p. 452.

*Sir R. E. Webster, A.-G.*, and *Ingle Joyce*, for the charities. The expression "deceased person" appears exclusively in certain sections of Part IV. of the Act of 1896 (s. 15, sub-s. 4; s. 20, sub-s. 1; s. 21), and the expression "the deceased" exclusively in certain other sections (s. 18; s. 19, sub-s. 1), and we say that, having regard to the scope of the several sections in which these expressions are respectively used, the Legislature intended those sections in which the expression "the deceased" is used to be retrospective. If Part IV. of the Act of 1896 and Part I. of the Act of 1894 are to be construed as one Act, and the same expression is used in both, one would expect the same construction to be placed upon it throughout.

(1) [1896] 1 Ch. 914.

in Soward's Handbook of Estate Duty,  
supplement to 2nd ed. Part I.; 102

(2) [1892] 3 Ch. 402, 421.

(3) November 30, 1896, referred to L. T. Journ. p. 141; 42 Sol. J. p. 288.



STIRLING J. STIRLING J. The point which arises on this summons is a short one, and the question has been raised by reason of some obscurity in the enactments to which I have been referred. The Finance Act, 1894, was passed in the year 1894, and imposed certain duties called estate duty and settlement estate duty. In the beginning of the year 1896 it was decided by North J. in the case of *In re Webber* (1) that, "When pecuniary legacies or shares of the residue of a testator's personal estate are settled by his will, no part of either the estate duty or the settlement estate duty imposed by the Finance Act, 1894, is to be borne by the settled legacies or shares, but the whole of those duties must be borne by the general residue." I am bound, I conceive, by that decision; and at any rate the Legislature appears from the Act which I have now to deal with to have adopted that as a correct interpretation of the Act of 1894, and it has not been argued before me on the present occasion that it is otherwise than correct. Therefore I assume that but for the Act of 1896 the settlement estate duty would in the present case have been payable out of the general residue of the testator's estate. The question is whether the Act of 1896 has made any difference. [His Lordship read ss. 19 and 24, and continued:—]

Now let us look for one moment at the Act of 1896 as it stands. In s. 19 the expression "deceased person" does not occur; the expression which is used is "the deceased." But if one were left simply to interpret this Act standing alone, I do not think that anybody, seeing that the Legislature has defined what it means by "deceased person," would suppose that there was any difference to be drawn in interpreting the Act whether it uses the words "deceased person" or "the deceased person" or "the deceased." It is difficult to suppose that the rule of interpretation laid down for the expression "deceased person" was not to apply to those other words.

No doubt a certain amount of difficulty is caused by the fact that in s. 39 it is provided that Part IV. of this Act shall be construed together with Part I. of the Finance Act of 1894, and s. 22 of that Act says this: "In this part of this Act, unless

(1) [1896] 1 Ch. 914.

the context otherwise requires, the expressions ‘deceased person’ and ‘the deceased’ mean a person dying after the commencement of this part of this Act.” The Legislature has there given interpretations to be placed both on the expressions “deceased person” and “the deceased”; but it draws no distinction between the two: they are both to be treated as meaning the same thing, namely, a person dying after the commencement of the Act, which was in August, 1894. Why, if I read and construe the Act of 1896 as part of Part I. of the Finance Act, 1894, I am to draw any distinction between “deceased person” and “the deceased” I fail to see. It has been ingeniously pointed out that there are certain sections in the Act of 1896 to which the use of the words “deceased person” is confined, and there are certain other sections in which the words “the deceased” are used, and it is said, and it may be possible, that the Legislature meant that there should be a difference between them; but I cannot see that the Legislature, if that were the meaning, has sufficiently indicated its intention. It seems to me, therefore, that I must put the same interpretation on the words “the deceased” in s. 19 as is given to the words “deceased person” in s. 24, and that in this case the old rule under the Act of 1894, as settled by the case of *In re Webber* (1), must be applied.

Solicitors : *Simpson & Co.* ; *Smiles & Co.* ; *Treasury Solicitor.*

(1) [1896] 1 Ch. 914.

H. B. H.

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STIRLING J.

1898

March 30, 31.

*In re* NICKELS.  
NICKELS v. NICKELS.

[1897 N. 1136.]

*Trustees—Residue—Appropriation of Assets—Settled Shares.*

Where a residuary trust fund is settled by will upon trust for several persons and their families, the trustees have power *virtute officii* to appropriate specific investments to any of the settled shares before the period of final division without making any corresponding appropriation to the other shares.

A testator gave the proceeds of his residuary estate upon trust as to one undivided sixth to pay the income to his eldest son for life, and after his death to pay the capital to his children, and as to the remaining five-sixths upon similar trusts for the testator's four other sons and his daughter and their children, and he empowered his trustees to pay over a portion of the capital of the settled shares to any of his six children absolutely, notwithstanding the previous trusts. In 1881 the then trustees paid to each of the five sons one-half of his share, and to the daughter one-sixth of her share absolutely; and they also set aside for the daughter and her children a sum of stock sufficient at its then value to make up with the sum advanced to her one-half of her share. The income of the stock was paid to the daughter till her death in 1896:—

*Held*, that there was a valid appropriation of the stock to the daughter's share, and that the distribution to her children ought to proceed on that footing.

CHRISTOPHER NICKELS, deceased, by his will dated May 26, 1859, gave his residuary estate to trustees upon trust to sell and convert and pay an annuity to his wife, and subject thereto to stand possessed of the trust estates, funds, and premises, and the rents, dividends, interest, and annual income thereof, as to one undivided sixth part thereof upon trust during the period of twenty-one years from his decease to accumulate one-half of the rents, dividends, interest, and annual income, and add the accumulations to the capital; and as to the other half, part of the annual income, to pay the same to his eldest son during the said period of twenty-one years. Then after the expiration of the twenty-one years the whole of the income was to be paid to the son, and after his death the capital was to be transferred to such of his children as should attain twenty-one. The testator

then conferred on the trustees powers for the maintenance and advancement of his son's children; and the testator further empowered the trustees, in case at any future period circumstances should exist which in their opinion rendered expedient the placing at the disposal of his son any portion of the one-sixth share the trusts whereof were thereinbefore declared to pay to his said son for his own use and benefit, or apply to his own use and benefit, any portion not exceeding one-half of the said one-sixth of the residuary trust premises; and immediately upon such transfer being made, the trusts of the will concerning so much of the said share as should be so paid or applied were to absolutely cease and determine. The will contained similar trusts, powers, and provisions as to four other sixths for the benefit of the testator's four other sons and their families. The remaining sixth was given upon trust for the testator's daughter, Mrs. Morton, and her family, with similar powers for the maintenance and advancement of her children, but without any special power, as in the case of the sons, to pay over any portion of the capital to her. The testator then conferred a general power upon the trustees to apply any portion not exceeding one-third part of the share or respective shares of the said trust premises to the income of which any of his six children or their children respectively should be entitled for or towards the putting him, her, or them respectively in any business, or otherwise advancing him, her, or them in the world, in the discretion of the trustees or trustee for the time being, anything in the said will to the contrary thereof in anywise notwithstanding.

The testator died on June 19, 1860.

In 1881, after the period of accumulation mentioned in the testator's will had elapsed, the then trustees under the power in the will in that behalf applied for the use and benefit of each of the five sons of the testator the sum of 2347*l.* 7*s.* 9*d.*, being a sum equivalent to one-half of one-sixth of the residuary trust premises. There being no such power in the will as to the share of the daughter, the trustees under the later power in the will applied the sum of 869*l.* 2*s.* 7*d.* (which was a sum equivalent to one-sixth of her share, or one-third of the amount

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STIRLING J. advanced to each of the sons) towards her advancement in the world. Shortly afterwards the then trustees (both of whom were now dead) set aside for Mrs. Morton and her family certain sums of stock of the London, Chatham and Dover Railway and the London and Greenwich Railway, which at the then market value made up, together with the sum advanced to her, one moiety of the one-sixth share to which she and her children were entitled. This transaction was entered in the accounts of the then trustees in this way. After setting out the advances made to the several children, the trustees made the following entry: "Stocks allotted to Mrs. Morton—to balance remaining, two-thirds set aside for her children, 300*l.* London and Greenwich 5½ at 216*l.*; 1053*l.* London, Chatham and Dover 4½ at 1284*l.* 13*s.* 3*d.*—total, 1500*l.* 13*s.* 3*d.*"

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In subsequent accounts rendered by the subsequent trustees of the will down to Mrs. Morton's death, this allotment or appropriation was recognised or referred to. The income of these stocks was paid to Mrs. Morton during her life, and out of the corpus advances were from time to time made to her children. Mrs. Morton having died in 1896, and the period having arrived for the distribution of the one-sixth share given in trust for her and her family, the question arose whether there had been a valid appropriation of these stocks to her share, or whether the distribution ought to proceed upon the basis of the present value of all the securities subject to the trusts of the will. Accordingly a summons was taken out by the present trustees to determine whether, upon the true construction of the will, the trustees had power to sever the trust premises into divided sixths prior to the periods for division among those entitled in reversion to the capital, and whether there had been an appropriation in fact. For the purposes of the summons it was assumed that the stocks in question were authorized investments under the will.

*Coldridge*, for the summons.

*Rowden*, for the eldest son, and *Gatey*, for the child of another son in the same interest. (1.) There has been no appropriation in fact. (2.) In the case of settled shares the



trustees have no power to appropriate specific investments to any particular share without making a corresponding appropriation to the other shares. The doctrine of appropriation is based upon consent. Here the trustees have made themselves conveyancers as to the five shares and consenting parties as to the sixth. They have no power to deal with the shares of persons not in a position to assent and to assign to them particular investments.

*In re Lepine* (1) was based upon agreement; *In re Richardson* (2) was founded upon the theory that each legatee was entitled to an aliquot part of every investment, and an appropriation on that footing would not be open to objection. To allow this appropriation is to give no meaning to the words "undivided shares." That the trustees ought not to have made an appropriation in a case of this kind without coming to the Court appears from Lewin on Trusts, 9th ed. p. 667.

*Stewart-Smith*, for the daughter's children. If consent is necessary, there can never be an appropriation in the case of settled shares till the final division; but in *In re Richardson* (2) North J. expresses his opinion to the contrary. This appropriation has been recognised by successive sets of trustees and has been acted on for fifteen years.

*Buckmaster*, for a mortgagee of the daughter's share in the same interest.

STIRLING J., after stating the facts as above:—The first question is whether in point of fact there has been made an irrevocable appropriation on the part of the trustees. It is suggested on behalf of the present trustees, and on behalf of the children entitled to the other five-sixths, that this was a mere book-keeping arrangement in order to avoid any question as to what rate of interest was to be charged on the advances made to Mrs. Morton and her children. It seems to me that that is not a sufficient explanation of what was done and of the entries made. If the appropriation was not made or intended Mrs. Morton and the other children have ever since that time been receiving the income on a wrong footing. The income

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(1) [1892] 1 Ch. 210.

(2) [1896] 1 Ch. 512.

STIRLING-J. of these stocks has been paid to Mrs. Morton. That could not be right if it was not meant as an effective appropriation. Whether she got too much or too little does not matter; the other parties have conversely received too little or too much. The fund has been dealt with on the footing that Mrs. Morton was entitled to the income ever since the year 1881, and it seems to me upon the evidence that the trustees did mean in the year 1881 to make a final and complete appropriation of these stocks, and that no explanation suggested in this case is adequate to account for what they did both in their books and by their acts. Then comes the question, Is this appropriation one which the trustees were entitled to make? Now, there is no question raised here as to the bona fides of the transaction. It was done in perfect good faith, and the sole question is whether it was within the power of the testator's trustees. No authority has been cited to shew that it was not; but reliance has been placed upon a statement in Mr. Lewin's well-known book, where this is said (9th ed. p. 667): "Where the residue consists of a great variety of securities, the question arises whether the trustees in the absence of any special power can *virtute officii*, where infants are concerned, divide the residue by appropriating some securities to one residuary legatee and other securities to another, but so that the distribution is a fair one according to the market price of the day of the funds so appropriated. The Court can make such an apportionment, for in a suit guardians *ad litem* of the infants are appointed and are heard on their behalf to protect their interests; but out of Court where the voice of the infants cannot be heard, it would be unsafe for trustees to make such an apportionment on their own responsibility." Now that is merely a statement to this effect—that trustees, where there is no express power, would not act wisely in making an appropriation without getting the sanction of the Court. That is very sound advice for a conveyancer to give to a trustee who is about to act by making an appropriation; but the question is, Supposing he does it, is it bad? And Mr. Lewin does not say so. He says the Court can make such appropriation, and that seems to imply that it is within the power of the

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trustee to make it, because the Court has no power to alter the rights of parties to property. It has simply power to administer trusts. Beyond that there are two cases which I agree do not in point of decision govern the present case, but at all events they go a long way to support the view which is contended for, namely, that the trustees have power in a proper case to make such an appropriation. The first is *In re Lepine*. (1) I do not propose to state the specific facts, but the present Master of the Rolls, dealing with the case, says this (2): "One of the persons entitled to one-sixth was a person who was of age and capable of entering into an agreement with the executor as to how he would take his sixth; and, instead of taking it in cash, he and the executor agree together that he should take a mortgage for 700*l.* in part payment of his legacy. Assuming for the moment that there were assets, and that the 700*l.*, in addition to what he got in cash or other securities, did not exceed the amount due to him, what is there amiss with that? What is there to prevent the trustee or the executor making such a transaction?" So that it is there laid down that where one legatee asks for payment of his share, the executor or trustee, without the assent of the persons entitled to the other shares, may take a specific asset and hand it over at a proper value to that legatee. Fry L.J. says (3): "Supposing an executor or trustee divides the estate in such a manner as that he gives to one legatee or cestui que trust property or securities worth twenty shillings in the pound, and he gives to another rubbish and trash which is not worth its nominal value, or the value at which he takes it, I have no doubt that such trustee or executor is guilty of a breach of trust, and that any legatee who takes the good securities with notice of what has been done may be made liable for that breach of trust." He does not say that the executors acting fairly may not divide the property in the proper shares between the legatees. The subsequent case of *In re Richardson* (4) was before North J. There there was an appropriation by executors to themselves of a certain

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(1) [1892] 1 Ch. 210.

(2) *Ibid.* 215.

(3) [1892] 1 Ch. 218.

(4) [1896] 1 Ch. 512.

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—

STIRLING J. portion of the property, although certain of the shares were settled, and although there was no corresponding appropriation in respect of the settled shares, and North J. makes this remark (1): "It has been suggested that there could be no appropriation of this stock to the daughters' shares till the final division. I do not assent to that. I have heard no authority and see no reason for such proposition. I see no reason why, if part of the estate can be distributed before the final division, it should not be distributed among all the shares, proper investments being appropriated to the trust shares, without waiting for the final division." What happened here was that in effect the sons got payment of one-half of their shares, and in order to put the daughter and her children on an equal footing with the sons, there being no power to make over an equal amount to the daughter and her children in cash, they set apart a fair amount of the estate to put the daughter and her children on the same footing as the sons. It seems to me it was within their power to do that, and I think the appropriation was good.

Solicitors: *E. G. Saunders ; T. W. Hall ; Douglas-Norman & Co.*

(1) [1896] 1 Ch. 516.

H. B. H.

*In re* ATKINSON.  
WALLER *v.* ATKINSON.

[1897 A. 583.]

STIRLING J.

1898

March 26, 31.

*Married Woman—Will—Probate—Invalid Bequest—Grant of General Probate  
to Husband—Implied Assent to Will.*

Since the coming into operation of the amended rules 15 and 18 of the Probate Rules (Non-contentious Business), which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.

*Ex parte Fane*, (1848) 16 Sim. 406, has no longer any operation.

THIS was in form a summons for the payment of a legacy of 10,000*l.* bequeathed by the will of Mrs. Atkinson, the wife of John Beaumont Atkinson. The object of the summons was to determine the question whether the husband, who was sole executor of the will, had by proving the will or otherwise assented to it as a disposition of property which the wife had no power to dispose of by will without the assent of her husband.

By her will dated May 6, 1880, the testatrix bequeathed all the personal estate of which, "by virtue of any power or authority, or of any separate right of property or otherwise howsoever," she was competent to dispose (including her portion or fortune and other interest, if any, under the will of her late father James Shaw Taylor) to her husband absolutely, subject nevertheless to the payment thereof of the pecuniary legacy thereafter bequeathed. The testatrix then bequeathed to Levina Waller, a sister of her late father, a sum of 10,000*l.*, which was to go over, in the event of the said Levina Waller dying in the lifetime of the testatrix, to the persons who would be entitled as her (Levina Waller's) next of kin if she had died immediately after the decease of the testatrix, and the testatrix appointed her husband sole executor of her will. The testatrix



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STIRLING J. died in February, 1892, and in the following May her husband obtained probate of her will in general form. At the time of her death there was pending a litigation in the State of New York with reference to the estate of J. S. Taylor mentioned in the will. J. S. Taylor was an Englishman, but he had considerable property in the United States, and one of the trustees of his will, who was resident in New York, had instituted a suit against the persons interested under that will or otherwise in the estate of J. S. Taylor for the purpose of having the estate, so far as it was under the control of the United States or the State of New York, administered by the Court. To that litigation the next of kin of Levina Waller, who had died in the lifetime of the testatrix, were parties, and after the death of the testatrix her husband as her legal representative also became a party, and put in an answer which was relied on upon the present summons as shewing his assent to the legacy of 10,000*l.* bequeathed by her will. It was ultimately held, as the result of the litigation in America, that the testatrix had no power of disposition over the property which came to her under the will of J. S. Taylor, but that she had an interest which did not form part of her separate estate, and could not be disposed of by her will without the assent of her husband.

Method (*Butcher, Q.C.*, with him), for the legatees. A husband who proves his wife's will in general form is presumed to have assented to the will, and cannot object that it extends to property which the wife had no right to dispose of: *Ex parte Fane*. (1) In *In the Goods of Price* (2) it was held that since the Married Women's Property Act, 1882, there was no necessity for limiting the grant of probate of the will of a married woman to such property as she had a right to dispose of; and in 1887 the rules of the Probate Court were altered in accordance with this decision. (3) But the new rules are not intended

(1) 16 Sim. 406.

(2) (1887) 12 P. D. 137.

(3) The amended rules 15 and 18 of the Probate Rules (Non-contentious Business), to take effect on April 19, 1887, provide as follows: "In a grant

of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same

to alter the law as to the presumed assent of the husband in a case where the wife has no power of disposition by will without the assent of the husband and the husband is the executor. In such a case he must still take out probate in a limited form. [He also cited *In the Goods of Cooper* (1) and *Smart v. Tranter*. (2)]

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Jenkins, Q.C., and *Stewart-Smith*, for the husband. Since the alteration in the Probate Rules *Ex parte Fane* (3) has no application, because the husband has no longer any right to obtain a limited grant, but is obliged to take out probate in general form if he proves at all. Under the old practice, if a wife made a will dealing with property which she had power to dispose of and property which she had not, the proper course was for the husband to obtain a grant of probate limited to the property which the wife was competent to dispose of and a grant of administration *cæterorum* as to the rest, and if he proved the will generally he was presumed to have assented to the inoperative provisions; but since the change in the practice there is no ground for that presumption. Under the present practice the grant of probate of the will of a married woman does not prejudice the rights of the husband. That this is so where probate is taken out by a stranger is clear from *Smart v. Tranter* (2); and it cannot be material whether the person who takes out probate is the husband or a stranger. The Probate Division has adopted a new rule of procedure by which husbands like other executors are bound; but it is not thereby intended to affect the beneficial rights of the parties.

Methold, in reply.

Cur. adv. vult.

the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor

or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy."—W. N. (1887) pt. ii. p. 172.

(1) (1881) 6 P. D. 34.

(2) (1890) 43 Ch. D. 587.

(3) 16 Sim. 406.

STIRLING J. March 31. STIRLING J., having stated the facts as above,
1898 continued:—The question is whether, under the circumstances
which I have mentioned, the husband, Mr. Atkinson, has
ATKINSON, assented to the disposition contained in the will so as to bind
In re. himself as against the legatees.
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Now under the practice which formerly prevailed in the Probate Court with reference to the wills of married women two grants were made. First of all, to the executor named in the will probate was granted, but limited to such property as the testatrix had a right to dispose of, and also, as I understand, to such property as she had actually disposed of by will. Then as regards any property which she had no power to dispose of by will or had not disposed of, a grant of administration *cæterorum* was granted to the husband. But after the passing of the Married Women's Property Act, 1882, it was found that this was inconvenient. One inconvenience was that, there being as it were two legal personal representatives of the married lady, persons who were indebted to her estate found a difficulty in knowing who was able to give a good receipt. Accordingly, a change was made in the practice, first of all by a decision of Butt J. in *In the Goods of Price* (1), and subsequently by some new rules passed on March 29, 1887, which provide as follows: [His Lordship read the new rules 15 and 18, and continued:—]

From a note to the case of *In the Goods of Price* (1), it appears that on May 17, 1887—i.e. after these rules had come into operation—in the case of *In the Goods of Homfray* (2), a married woman who died before the passing of the Married Women's Property Act, 1882, leaving a will executed under a power but disposing of property not included in the power, an application was made for a grant limited in the old form to the personal estate which she had a right to dispose of by will; but the Court held that under the new rules the grant could no longer be so limited, but must be in general form. I have made inquiry as to what the practice of the Court of Probate is, and I am informed that that is the decision which is considered binding on the Court, and that the

(1) 12 P. D. 137.

(2) (1887) 12 P. D. 138, n.

Court adheres to that practice, and requires the executor to STIRLING J. take probate in general form.

The question under these circumstances is, Does the probate by the husband of this will operate as an assent by him? Under the old practice I think it was settled that it did so operate. The case of *Ex parte Fane* (1) is an authority to that effect. There the husband, having the option of having the will proved so far as it was an effectual disposition of property and taking the grant of administration *cæterorum*, chose to prove the will generally, and it might very well be held that that was an assent to the will. But under the present practice he can no longer adopt that course. It has been held by the Court of Appeal in the case of *Smart v. Tranter* (2) that the new rule of the Court of Probate does not affect the rights of any parties under the will. The present Master of the Rolls there says (3): "It is manifest that this alteration in the practice of the Probate Court cannot affect the rights of parties to property. It is mere matter of machinery." Having regard to the obligation upon the husband under the present practice either to take probate in general form or else renounce altogether, it appears to me that he ought not by taking probate in this form to be deemed to have assented to the will as a disposition of property which the wife had no power to dispose of. [His Lordship then dealt with the contention that the answer filed by the husband in the American proceedings amounted to an implied assent to the will, and held that there was no assent.]

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Solicitors: *Learoyd, James & Mellor, for Learoyd & Co., Huddersfield; Busk, Mellor & Norris, for Sale, Seddon & Co., Manchester.*

(1) 16 Sim. 406.

(2) 43 Ch. D. 587.

(3) 43 Ch. D. 597.

H. B. H.

KEKEWICH

J.

1898

Feb. 16.

HUMMEL v. HUMMEL.

[1897 H. 2259.]

Will—Power of Appointment—General Power—French Will—Unattested Will—Execution of Power—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, 27—Lord Kingsdown's Act (24 & 25 Vict. c. 114), s. 1.

A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law:—

Held, that the writing, even if admissible to probate under s. 1 of Lord Kingsdown's Act (24 & 25 Vict. c. 114), did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by ss. 9 and 10 of the Wills Act (1 Vict. c. 26).

In re Kirwan's Trusts, (1883) 25 Ch. D. 373, followed.

D' Huart v. Harkness, (1865) 34 Beav. 324, considered.

EDMUND GEORGE HUMMEL, who died on April 13, 1871, by his will dated January 8, 1864, after appointing executors and trustees and bequeathing various legacies, gave his residuary estate to his trustees in trust for and to be equally divided among all his children who being sons should attain twenty-one, or being daughters should attain that age or be married, and the children of any son dying under twenty-one and leaving issue. And the testator declared that if any of his children, or of his grandchildren born in his lifetime, should be daughters or a daughter, then the share to which such daughter should become entitled in the trust estate should be held by his trustees in trust to pay the income thereof to her for her separate use during her life, and after her death upon trusts therein declared in favour of her children, and in default of such children, in trust for such person or persons as she (whether married or not) should by her will or codicil appoint; and in default of such appointment in trust for such person or persons as at the time of the failure of all the trusts therein-before declared concerning such share would be her next of kin according to the Statute of Distributions in case she had died

intestate and unmarried, and if there should be more than one such person then in such shares as directed by the said statute. And the testator empowered each daughter by will or covenant to appoint all or any part of the income of her share to her husband for his life or any less period.

The testator left issue five children only, namely, the defendant Edmund Henry Hummel, Louisa Ann Hummel, the defendant Eliza Jane de Brandt (the wife of Franz de Brandt), the defendant Marion Horton Clough, and the defendant Sarah Ellen Hummel, all of whom attained twenty-one. His residuary estate consisted of securities of the value of about 18,000*l*. In 1876 his daughter Louisa Ann Hummel married the defendant Franz Anton Greif, an Austrian subject, who in 1888 deserted his wife and never subsequently lived with her. Madame Greif died without issue at Nice in France on July 24, 1896, in a house which she possessed and in which she had resided for many years previously.

Paragraph 10 of the statement of claim stated that amongst her papers found in the said house after her death was a paper writing in her handwriting as follows:—

“To my executors. I leave Arthur Brandt”—meaning thereby the defendant so named—“in case of my death the sum of (600*l*.) six hundred pounds.

“Louisa Ann Greif.

“Nice,

“June 26th, 1896.”

This was the only will or testamentary document of the deceased that could be found.

Paragraph 12 of the statement of claim then alleged that the paper writing set out in paragraph 10 constituted a valid will, so far as its form was concerned, according to the law of France, but that the same had never been registered or otherwise dealt with in France as a will, or proved in this country.

This action was brought by the present trustees of the will of the testator E. G. Hummel against persons who at the death of Louisa Ann Greif would be her next of kin according to the statute in case she died intestate and unmarried, and

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KEKEWICH J. also against Franz A. Greif and Arthur Brandt, for the determination of the question (among others) whether the paper writing set forth in paragraph 10 of the statement of claim constituted an exercise by Louisa Ann Greif of the power of appointment given to her by her father's will.

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The only defence to the action was by the defendant Sarah Ellen Hummel, who had taken out administration in France to the estate of her sister Madame Greif. She contended that the paper writing mentioned in paragraph 10 of the statement of claim did not constitute a valid will according to the law either of France or of Austria; and that, whatever might have been the status or domicile of the defendant Franz Anton Greif and his wife respectively since their marriage, there had been no exercise by the latter of her testamentary power of appointment under her father's will.

The action now came on for trial as a non-witness action, together with a summons by the plaintiffs asking whether Louisa Ann Greif's share was distributable upon the assumption that she died without having exercised her power, and for certain inquiries.

T. L. Wilkinson, for the plaintiffs. The difficulty here arises in consequence of two conflicting decisions. According to *D'Huart v. Harkness* (1), before Romilly M.R., the paper writing now in question, being a will valid according to the law of France, would be a good execution of the power. But in a later case, *In re Kirwan's Trusts* (2), in which *D'Huart v. Harkness* (1) was not cited, Kay J. held that, in the case of a will which is only valid by reason of Lord Kingsdown's Act (24 & 25 Vict. c. 114), ss. 9 and 10 of the Wills Act (1 Vict. c. 26)—providing that no appointment by will in exercise of a power shall be valid unless attested by two or more witnesses—must be complied with. The Wills Act seems precise on the point, so that *In re Kirwan's Trusts* (2) appears to be the more correct decision. [He also referred to Theobald on Wills, 4th ed. p. 2.]

MacSwinney, for the defendant Edmund Henry Hummel.

Austen-Cartmell, for the defendant Sarah Ellen Hummel.

(1) 34 Beav. 324.

(2) 25 Ch. D. 373.

Ingpen, for the defendant Arthur Brandt, referred to s. 27 of KEKEWICH J. the Wills Act (1 Vict. c. 26).

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KEKEWICH J. The difficulty in this case arises from two apparently conflicting decisions, *D'Huart v. Harkness* (1), by Sir J. Romilly M.R. in 1865, and *In re Kirwan's Trusts* (2), by Kay J. in 1883, in which case *D'Huart v. Harkness* (1) was not cited. In *D'Huart v. Harkness* (1) Sir J. Romilly M.R. said this (3): "When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will, which, according to the law of this country is valid, though it does not follow the forms of the statute." The document submitted to my consideration is set out in paragraph 10 of the statement of claim. It is, I will assume, as stated in paragraph 12, a valid will according to the law of France (4); but it is not a will that could under the provisions of the Wills Act be proved in this country. •

The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay J. in *In re Kirwan's Trusts* (2) is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart v. Harkness* (1), where Sir J. Romilly M.R. decided that a power to appoint "by a will duly executed" is well exercised by a will good according to the law of the country of the testator's domicile, though ill executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts* (2); but the latter is cited in a note on p. 308 of 1 Williams on Executors, 9th ed., as the authority for the proposition that in the case of a will which is only valid by reason of the Act 24 & 25 Vict. c. 114, ss. 9 and 10 of the Wills Act must be complied with. That appears to me to form the distinction between the two cases. The Act 24 & 25 Vict.

(1) 34 Beav. 324.

(2) 25 Ch. D. 373.

(3) 34 Beav. 328.

(4) [See Code Nap. art. 969, 970.]

KEKEWICH c. 114 (Lord Kingsdown's Act), provides, in s. 1, that every
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— will or other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

Now, if the testamentary instrument in question here could be admitted to probate in this country under the statute just cited, it would still be necessary, according to the decision in *In re Kirwan's Trusts* (1), and in my judgment, in order that it might operate as a good execution of the power given to the testatrix, to consider whether it complies with the requirements of ss. 9 and 10 of the Wills Act (1 Vict. c. 26), which provide that no appointment by will, in exercise of a power, shall be valid unless attested by two or more witnesses: that it clearly does not, and, therefore, in any case this testamentary instrument cannot operate as an execution of the power.

It is said that the defendant Arthur Brandt can claim under s. 27 of the Wills Act, which says that a general bequest shall include estates over which the testator has a general power of appointment; but that section cannot be read as an exception to s. 10 unless the language to that effect is clear, and, in my opinion, it would not be right to treat s. 27 as controlling s. 10, which expressly says that "no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required," that is to say, attested by two or more witnesses.

There must, therefore, be a declaration that the paper writing referred to in paragraph 10 of the statement of claim is not a valid exercise of the power of appointment given to Madame Greif by the will of E. G. Hummel; and the trustees of that will must divide the trust fund on the footing of there

having been no exercise of the power by Madame Greif. The costs of all parties, as between solicitor and client, will be taxed, and paid out of Madame Greif's settled share under the will. There will be one order in the action and on the summons.

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Solicitors: *A. F. Church; Travers Smith, Braithwaite & Robinson; Deacon & Co.; Hughes & Bartlett.*

G. I. F. C.

In re BROOKE AND FREMLIN'S CONTRACT.

KEKEWICH
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[1898 B. 745.]

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Married Woman—Mortgagee—Separate Property—Conveyance to Purchaser by Mortgagor and Mortgagee—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 5—Acknowledgment of Deed unnecessary.

March 26.

A married woman, to whom, subsequently to the Married Women's Property Act, 1882, real estate is conveyed by way of mortgage to secure money belonging to her as her separate property, can convey to a purchaser from the mortgagor without the concurrence of her husband, or acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act.

The decision in *In re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358, distinguished, as not being applicable to the case of a married woman who is a mortgagee, and not a trustee.

ADJOURNED SUMMONS.

By a contract dated January 14, 1898, Charles Edward Brooke agreed to sell to Walter Thomas Fremlin certain freehold hereditaments for the sum of 550*l*.

On the investigation of the title it appeared that by an indenture dated November 28, 1895, and made between Charles Edward Brooke of the one part, and Sarah Elizabeth Theobald, the wife of John Theobald, of the other part, the property comprised in the contract was conveyed to Sarah E. Theobald by way of mortgage for securing to her the repayment of 150*l*. and interest with the usual proviso for redemption.

The mortgage money in fact belonged to Mrs. Theobald as part of her separate estate.

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The purchaser required that the deed of conveyance to him by Mrs. Theobald and the vendor C. E. Brooke should be acknowledged by her under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), and that her husband should concur in the deed notwithstanding the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and referred to the decision of North J. in *In re Harkness and Allsopp's Contract* (1) as an authority shewing that such acknowledgment and concurrence were necessary.

The vendor declined to comply with this requisition, contending that as Mrs. Theobald was not a trustee the case referred to did not apply, and subsequently the present summons was taken out by the vendor under the Vendor and Purchaser Act, 1874, asking for a declaration that it was not necessary to secure the concurrence of the husband of Mrs. Theobald in the sale or conveyance, that the conveyance need not be acknowledged by her under the Fines and Recoveries Act, and that the vendor with her concurrence could make a good title to and convey the property to the purchaser.

Warrington, Q.C., and *Harry Greenwood*, for the vendor, in support of the summons. The married lady being a mortgagee and not a trustee, the decision of North J. in *In re Harkness and Allsopp's Contract* (1) is not applicable to her, and she is competent to convey as if she were a feme sole. That decision was based entirely on the ground that the Married Women's Property Act, 1882, applies only to real estate vested in a married woman in her own right, and not as a trustee. Here the mortgage was vested in the married woman in her own right, and to secure money advanced by her and belonging to her as part of her separate property. Under an ordinary mortgage deed a mortgagee is in no sense a trustee for the mortgagor until he has been paid his principal, interest, and costs. Until then, the only relation subsisting between the parties is that of mortgagee and mortgagor: *Warner v. Jacob*. (2) When the mortgagee has been paid off he becomes a bare trustee, and where, as here, the bare trustee is a married

(1) [1896] 2 Ch. 358.

(2) (1882) 20 Ch. D. 220.

woman, all difficulty is removed by s. 16 of the Trustee Act, 1893, replacing s. 6 of the Vendor and Purchaser Act, 1874, and providing that when any freehold hereditament is vested in a married woman as a bare trustee she may convey it as if she were a feme sole: see Wolstenholme's Conveyancing and Settled Land Acts, 7th ed. pp. 11, 212. It follows, therefore, that either under s. 16 of the Trustee Act, 1893, or under the Married Women's Property Act, 1882, s. 1 sub-s. 1, and s. 5, the concurrence of the husband of this married lady in the deed of conveyance to the purchaser, and the acknowledgment of the deed by her under the Fines and Recoveries Act are unnecessary.

Ashton Cross, for the purchaser. The effect of the decision of North J. in *In re Harkness and Allsopp's Contract* (1) is that wherever there is any fiduciary element attaching to the capacity in which a married woman holds real estate, the case is not within the provisions of the Married Women's Property Act, 1882. The essence of the decision is that "separate property" means property separate from the interference of any one. That is not so in the case of a mortgagee who, although his estate at law is absolute, is in many respects in a fiduciary position towards the mortgagor. If the money due on the mortgage is paid off the mortgagee, no doubt, becomes a bare trustee, and if that were so in this case the married lady could convey as if she were a feme sole, but as, in the present case, she is concurring with the mortgagor in conveying, a fiduciary element is attached to her interest in the land sufficient to bring the case within the principle of the decision of North J.

[KEKEWICH J. A mortgage is sometimes made by way of trust for sale.]

In such a case the title would be that of a mortgagee only, but the decision of North J. in *In re Harkness and Allsopp's Contract* (1) would be clearly applicable. The only question is whether that decision covers this case, and it is submitted that it covers every case where the element of trust is present.

(1) [1896] 2 Ch. 358.

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Warrington, Q.C., in reply. The case of a mortgage in trust for sale may be within the letter of the decision of North J., but it is not within the spirit of it. It is well established that though a mortgage is in the form of a trust for sale, yet the relation between the parties is that of mortgagee and mortgagor, and not trustee and cestui que trust, and, as there is no trust affecting the mortgaged estate, the Statutes of Limitation apply, although they would not be applicable in the case of a trust: *Locking v. Parker*. (1)

KEKEWICH J. The point now raised under the Married Women's Property Act, 1882, is a novel one, and I have not been referred to any authority bearing upon it more nearly than the case of *In re Harkness and Allsopp's Contract* (2) before North J. In that case the married woman was a trustee—not merely a bare trustee, but a trustee in the ordinary meaning of that word, and it was on that ground and no other that North J. held that she was not a married woman entitled to her separate use within the provisions of the Act of 1882. From the beginning of his judgment, where he calls attention to the title of the Act, to the end he appears to me to proceed entirely on the view that property of which a married woman is a trustee is not the married woman's property. I, of course, accept that decision, but, without presuming to criticize it, I may say that the Act might, with convenience, have been interpreted differently. North J., however, did not see his way to that. But his decision is confined to the case of a married woman who is a trustee, and what I have to consider is whether this lady, Mrs. Theobald, is a trustee within the meaning of that decision; that is, a trustee other than a bare trustee. If she were a bare trustee no difficulty could arise, because by s. 16 of the Trustee Act, 1893, which has now replaced s. 6 of the Vendor and Purchaser Act, 1874, a married woman who is a bare trustee can convey as if she were a feme sole, and this lady, on being paid all principal money, interest, and costs due to her under this mortgage, which was part of her separate property, would become a bare trustee. But if

(1) (1872) L. R. 8 Ch. 30.

(2) [1896] 2 Ch. 358.

she is not a bare trustee, if the money is not to be paid to her in such a way that she will be denuded of all beneficial interest—which I apprehend to be an essential element of a bare trusteeship—the question is whether she, being a mortgagee, can, notwithstanding the decision in *In re Harkness and Allsopp's Contract* (1), convey as a feme sole. It is elementary law that for the creation of a trust there are three requisites—a trustee, a cestui que trust, and property which the one man holds on trust for the other. Here it is easy to find a trustee in the person of the mortgagee, and a cestui que trust in the person of the mortgagor; but where is the property which is held on trust? A mortgagee, under an ordinary mortgage deed, is not a trustee of the mortgaged property until he has been paid his principal, interest, and costs, and then he becomes a bare trustee. He, no doubt, holds the mortgaged property to some extent in a fiduciary capacity; he cannot, for example, exercise his statutory or other powers otherwise than with due regard to the interest of the mortgagor, nor can he convey in such a way as to burden the equity of redemption; there are many obligations laid upon him, but he is not a trustee of the mortgaged property and estate for the mortgagor. The property is held subject to an equity of redemption, but until redemption, it belongs to the mortgagee as his own. Where a mortgagee has not entered into possession, there is no fiduciary relation whatever between him and the mortgagor as respects the mortgaged property. The security is created for the mortgagee's benefit in order to provide for the repayment of the moneys due to him. It being clear, therefore, that the mortgagee is not a trustee of this property for the mortgagor, and there being no other possible cestui que trust, it follows that she is not a trustee of this property at all. The result is that the decision in *In re Harkness and Allsopp's Contract* (1) is not applicable to the present case, and that this married lady, in whom this mortgage, effected after the commencement of the Act of 1882, is vested as her separate property, can, by virtue of the Act, deal with the security and convey the legal estate in the land as if she were a feme sole, and that the

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KEKEWICH J. purchaser is bound to complete without requiring the concurrence of her husband or the execution of an acknowledged deed by her.

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Solicitors: *E. C. Rawlings & Butt; Walter Webb & Co.*

C. C. M. D.

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April 2.

In re SERLE.
GREGORY v. SERLE.

[1893 S. 258.]

Landlord and Tenant—Forfeiture of Lease—Breach of Covenant—Notice—Sufficiency—Right to Possession—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14.

A notice served by a lessor on his lessee under s. 14 of the Conveyancing Act, 1881, merely informing the lessee that he "has not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is not sufficient, as it does not direct the attention of the lessee to the particular breaches complained of, so as to give him an opportunity of remedying them before an action is brought against him.

Fletcher v. Nokes, [1897] 1 Ch. 271, followed.

The fact that such a notice sufficiently specifies other breaches of covenant which are complained of will not make the notice sufficient within the section.

CLAIM by a creditor in an administration action.

By an indenture of lease dated October 31, 1876, a house, No. 10, Wellclose Square, in the parish of St. George, Middlesex, was demised to Thomas John Serle for forty-one years from September 29, 1876, at the yearly rent of 19*l.* 15*s.* 8*d.* By the lease Serle covenanted with the lessor that he would "sufficiently repair, uphold, sustain, support, pave, scour, cleanse, glaze, amend and keep the said messuage tenement and premises, and all improvements and additions thereto, and all and every the party-walls, posts, pales, rails, pavements, chains, glass, windows, and other appurtenances in, by and with all needful and necessary reparations, &c., when, where, and as often as occasion shall require; and so well and sufficiently repaired, &c., deliver up at the end of the term." The

lease also contained covenants by the lessee to paint externally in every third year of the term, and to paint and whiten internally in every seventh year. The lessor was to be at liberty at seasonable times to enter upon the demised premises and examine their state and condition, and give or leave notice for the lessee to repair and amend within three calendar months, and the lessee thereby covenanted to repair accordingly. The lease contained a proviso that if the said yearly rent thereby reserved or any part thereof should be in arrear and unpaid for the space of twenty-eight days, or in case the lessee should fail to perform all or any or either of the covenants, conditions, and agreements thereinbefore contained and on his part to be observed and performed, then and in any or either of the said cases happening it should be lawful for the lessor, her heirs or assigns into and upon the demised premises or any part thereof to re-enter, and the same and every part thereof, to have again, retain, repossess, and re-enjoy.

Serle died in August, 1892. This action was brought against his executors for the administration of his estate, and judgment was given on February 10, 1893.†

It appeared that the house at the date of the lease was very old, having been erected nearly 200 years, and shortly after Serle's decease it became probable that the house would be condemned by the authorities.

On August 11, 1893, the reversioner, Frances Louisa Itter, caused the following notice to repair to be served by her solicitors on the executors of Serle: "We hereby give you notice that you have committed breaches of the covenants contained in the said lease. First, that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof; secondly, that you have not painted the outside wood and ironwork in every third year of the said term; thirdly, that you have not within each seven years of such term painted and whitened all the internal parts of the said premises where usually painted and whitened. Now we do hereby require you to remedy the said breaches of covenant, and to make fair and reasonable compensation for the said breaches of covenant, and we hereby give you notice that unless within

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KEKEWICH one month or a reasonable time hereafter you remedy the said breaches and make reasonable compensation in money for the said breaches to her satisfaction, the said Frances Louisa Itter will commence an action in the Queen's Bench Division, or such other Division as she may be advised by the High Court of Justice. And we also require you in accordance with s. 2, sub-s. 1, of the Conveyancing Act, 1892, to pay to the said Frances Louisa Itter the sum of 3*l.* 3*s.* for costs and expenses incurred by her in the employment of a solicitor and surveyor, or otherwise in reference to the said breaches of covenant."

Subsequently to the notice rent was paid and a receipt given for the same.

In October, 1897, the house No. 10, Wellclose Square was condemned by the county council as a dangerous structure, and was subsequently demolished.

The reversioner, Frances Louisa Itter, carried in a claim in the action for damages, for dilapidations, and breach of the covenant to repair contained in the deed of October 31, 1876, and for possession of the premises on forfeiture for breach of covenant.

Upon the claim for possession, the question arose whether the notice of August 11, 1893, was sufficient under s. 14 of the Conveyancing and Law of Property Act, 1881.

Warrington, Q.C., and *H. J. Turrell*, for the claimant. The notice of August 11, 1893, was a sufficient compliance with the requirement of s. 14 of the Conveyancing Act, and, breach of covenant being clearly proved, the lessor is entitled to enforce her right of re-entry. The right to possession is therefore established, and effect can be given to it on the present claim. [In respect to the claim for damages, they submitted that the measure of damage was the sum of money which must be expended in order to place upon the land demised buildings such as would have been on the land if the covenants of the lease had been performed; and referred to *Yates v. Dunster* (1), *Joyner v. Weeks* (2), and *Penton v. Barnett*. (3)]

(1) (1855) 11 Ex. 15.

(2) [1891] 2 Q. B. 31.

(3) [1898] 1 Q. B. 276.

Renshaw, Q.C., and *W. L. Richards*, for the executors of **KEKEWICH J.**
 Serle, the lessee. The notice of August 11, 1893, was not a
 sufficient compliance with s. 14 of the Conveyancing Act, first,
 because it did not specify the particular breaches of covenant
 complained of in such a way as to give the lessee a fair oppor-
 tunity of remedying them: *Fletcher v. Nokes* (1); and, secondly,
 because by the terms of the lease the lessee was entitled to a
 three months' notice of defect to repair, and by the notice of
 August 11, 1893, a period of one month only was fixed. The
 case of *Fletcher v. Nokes* (1) is conclusive as regards the insuffi-
 ciency of the notice with respect to the breach of covenant to
 repair, and it is submitted that, within the principle of that
 decision, the notice with respect to the other breaches of cove-
 nant was too indefinite. But if the notice is insufficient as to
 any one substantial breach of covenant, it is, under the section,
 bad altogether.

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[They admitted that the invalidity of the notice would not affect the right to sue for damages, or carry in a claim in the action, but submitted, upon the authority of *Lister v. Lane* (2), that having regard to the age and condition of the demised buildings, nominal damages only ought to be given.]

Warrington, Q.C. (called upon to reply only as to the validity of the notice). Assuming that the notice as to the repairs is too general, and therefore insufficient, I submit that as to the other breaches it is sufficient. In respect of those breaches, therefore, there is nothing in s. 14 of the Conveyancing Act to prevent the right of re-entry from being enforceable.

KEKEWICH J. The point raised on this notice is one of considerable importance; but in determining it I am assisted by the judgment, to which I will presently refer, of North J. in *Fletcher v. Nokes*. (1) The notice given by the lessor's solicitors commences as follows: "We hereby give you notice that you have committed breaches of the covenants contained in the said lease. First, that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof." That is the first and by far the most important

(1) [1897] 1 Ch. 271.

(2) [1893] 2 Q. B. 212.

KEKEWICH part of the notice. Then the notice proceeds: "secondly, that
 J. you have not painted the outside wood and ironwork in every
 1898 third year of the said term; thirdly, that you have not within
 ~~~~~  
 SERLE, each seven years of such term painted and whitened all the  
*In re.* internal parts of the said premises where usually painted and  
 GREGORY whitened." The second and third heads are, at any rate  
 v. on the face of them, sufficiently specific. The judgment of  
 SERLE. North J. leads me to that conclusion. It is not necessary that  
 — the notice should specify any particular part of the outside, or  
 that any particular part of the inside was not usually painted  
 and whitened, or point out any particular wall which has not  
 been painted and whitened. There might be some question  
 raised as to the words "in every third year," and "in every  
 seventh year," namely, whether after a lease has been running  
 for some time, a particular period of three or seven years ought  
 not to be specified. I am not quite satisfied, on the authority  
 of *Fletcher v. Nokes* (1), that as to that the notice is sufficiently  
 definite, but for the present purpose I will assume that it is. In  
 addition to the judgment of North J., there are some useful obser-  
 vations of Collins L.J. in *Penton v. Barnett*. (2) He refers to  
 s. 14 of the Conveyancing and Law of Property Act, 1881, and  
 says, "I think that we ought to construe the words 'particular  
 breach' in the section according to the obvious intention of the  
 Legislature, which was that the tenant should be informed of  
 the particular condition of the premises which he was required  
 to remedy. The expression 'breach' means the neglect to deal  
 with the condition of the premises so pointed out, and not  
 merely failure to comply with the covenants of the lease. The  
 common sense of the matter is that the tenant is to have full  
 notice of what he is required to do." That is entirely in  
 accordance with the principle on which North J. proceeded in  
*Fletcher v. Nokes*. (1) He says (3): "I do not mean that the  
 landlord need go through every room in the house and point  
 out every defect. But the notice ought to be so distinct as to  
 direct the attention of the tenant to the particular things of  
 which the landlord complains." Then he gives the reason:

(1) [1897] 1 Ch. 271.

(2) [1898] 1 Q. B. 276, 281.

(3) [1897] 1 Ch. 274.

“So that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him.” It seems to me that I find in those judgments a clear rule laid down both by Collins L.J. and by North J., and that applying that rule to the present case I must hold that the first branch of this notice is bad.

But then on behalf of the lessor it is said that there are two other breaches of covenant mentioned in the notice, namely, the painting outside in every third year, and painting and whitening inside in every seventh year, in respect of which, without considering the matter further, I have treated the notice as good. It may be true that distinct breaches are sufficiently specified, but according to the judgments to which I have referred, and particularly that of North J., the tenant has not had an opportunity of considering what he has to do in order to avoid the forfeiture. I do not think it is enough for the landlord in effect to say to the tenant, “At all events you must do this.” That is not sufficient information. The tenant is entitled to look at the matter in this way: “Suppose I do spend money in painting and whitening, still I have to make good the other breach, which may be much more onerous, and involve me in much greater expense, and so, after I have painted and whitened, I may have my lease forfeited because I have not complied in some unspecified way with another covenant.” Those considerations seem to me to shew that the notice cannot be saved as a whole because a part of it is good.

A further objection is made to the notice on the ground that it requires that the breaches of covenant should be remedied within one “month,” or a reasonable time thereafter, instead of allowing three calendar months in accordance with the lease. But the section says in effect that the right of re-entry or forfeiture under a lease is not to be enforceable unless and until the lessor serves on the lessee a certain notice, “and the lessee fails within a reasonable time thereafter” to remedy the breach, &c. Here the time given was a month, and the fact that a period of three months is given by the lease does not seem to me to be a good ground of objection to the notice. The bargain between the lessor and lessee is that the lessor may re-enter

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KEKEWICH after a certain time, and that the lessee is to have a period of  
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three months within which to do that which is required by the  
lessor. But that does not affect the statutory privilege given  
to the lessee. All he is entitled to is a notice according to the  
statute, and, if the notice had been otherwise good, a month for  
the purposes of it would be a sufficient time. But for the reason  
I have mentioned I hold the notice to be bad, and consequently  
the claim of the lessor to possession must fail.

[His Lordship then dealt with the claim to damages, and  
held that the claimant should be allowed to prove for damages  
caused by the breach of the covenant to repair down to the  
time when further repair became impossible.]

Solicitors : *E. A. T. Breed ; Anning & Co.*

C. C. M. D.

*In re* WHITE'S CHARITIES.  
CHARITY COMMISSIONERS *v.* THE MAYOR OF  
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April 19, 20.

[1890 W. 235.]

*Vendor and Purchaser—Soil of Highway—Street in Town—Right of Adjoining Owner ad medium filum viæ—Conveyance of Land Adjoining Street—Presumption.*

The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country; and this presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the medium filum viæ; in such a case the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor.

ADJOURNED SUMMONS.

This was an application by the Charity Commissioners under the Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), for the purpose of ascertaining which of the two defendants, the Corporation of London, or one Henry Thomas Tubbs, was liable to pay two perpetual rent-charges or quit-rents of 7*l.* and 6*l.* 12*s.* 6*d.*, issuing out of a piece of land formerly the site of No. 24, Shoe Lane, and for an order on one of the defendants for payment of the same.

The facts, so far as material, were as follows: The rent-charges were created by the will of one Thomas White in 1619, and were charged upon certain houses at the corner of Shoe Lane and Stonecutter Street, which in 1824 were known as No. 24, Shoe Lane.

In 1824 the corporation were empowered by Act of Parliament to make a market, subsequently known as Farringdon Market, and to extend and improve the approaches to it by widening the streets; acting under this statutory power the corporation acquired a considerable area upon which the new market was erected, and 24, Shoe Lane, with other property, was duly conveyed to the corporation by the various freeholders,

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subject to the said several rent-charges, and to other rent-charges issuing out of other parts of the property so purchased. These rent-charges, amounting altogether to 28*l.* 16*s.* 6*d.*, were known in the offices of the Comptroller and the Chamberlain of London as the "Farringdon Market Rent-Charges," and were paid by the corporation up to the time of the sale to the defendant Tubbs.

The site of the house formerly known as 24, Shoe Lane was thrown into and made part of Stonecutter Street, St. Bride Street, and Shoe Lane, but the rent-charges thereon were continued to be paid by the corporation as part of the Farringdon Market rent-charges.

In 1892 the corporation, under further statutory powers, sold the site of the old Farringdon Market to the defendant Tubbs for 98,100*l.*, subject to particulars and conditions of sale which stated, "the property is liable to various rent-charges amounting to the sum of 28*l.* 16*s.* 6*d.*, and the purchaser shall take the land subject thereto," and provided for a very limited investigation of title. Particulars of the said rent-charges, with five others which made up the total 28*l.* 16*s.* 6*d.*, were furnished to the purchasers' solicitor, but no information as to the origin of them, or as to the particular portion of the land out of which they issued, was supplied, the corporation not being in a position to do so owing to the time that had elapsed and the changes in the character of the property that had been made since their creation.

When the conveyance was completed, it was arranged, for the convenience and at the request of the defendant Tubbs, that the property should be divided into forty separate lots and conveyed to the defendant Tubbs or his nominees by forty separate conveyances. Each conveyance was in substantially the same form, except as to the description of each lot and the purchase-money, and contained a recital of the contract for sale "for an estate of inheritance in fee simple in possession, subject as to some part or parts thereof to certain rent-charges amounting together to 28*l.* 16*s.* 6*d.*, but otherwise free from incumbrances, and at the price of 98,100*l.*, of the hereditaments and premises lately known as Farringdon Market and the site

thereof of which the hereditaments expressed and intended to be hereby conveyed form part"; and each lot was conveyed "subject to such part or parts, if any, of the said rent-charges or any of them as may be charged upon the said hereditaments and premises hereby assured or any part or parts thereof." There was no covenant by the purchaser to pay these rent-charges or to indemnify the corporation against them.

The particular plot in respect of which the liability to pay the said two rent-charges was said to attach was conveyed to the defendant Tubbs, and was described as "situate in and on the north side of Stonecutter Street and on the east side of Shoe Lane" . . . "the ground plot of which piece of land, with the boundaries, abuttals and dimensions thereof, is delineated in the plan" drawn on the conveyance.

This plan shewed that the lot was a corner plot, and bounded on the south by Stonecutter Street and on the west by Shoe Lane. It was proved at the hearing that the centre line of Stonecutter Street, where it abutted on this plot, passed through the site of the former messuage, 24, Shoe Lane, and as it was also admitted that the said rent-charges issued out of what was formerly the site of 24, Shoe Lane, the only question argued was whether the corporation or the defendant Tubbs was to pay them.

*Vaughan Hawkins*, for the plaintiffs, stated the facts to the Court, but, as the right of the plaintiffs to recover these rent-charges from one or other of the defendants was admitted, took no further part in the arguments.

*Neville, Q.C.*, and *A. J. Allen*, for the corporation. The conveyance to the defendant Tubbs passed the soil of the road abutting on to it up to the medium filum, and with it part of No. 24, Shoe Lane, out of which these rent-charges issue: *Micklethwait v. Newlay Bridge Co.* (1) That is the presumption of law in a conveyance of such a plot as this; this presumption may be rebutted, but there is nothing in the conveyance itself nor in the surrounding circumstances to rebut

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ROMER J. the presumption in this case. It was intended from the first that the purchaser should pay these rent-charges.

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[They were stopped.]

*Farwell, Q.C., and Sheldon*, for the defendant Tubbs. We never contracted to purchase the site of No. 24, Shoe Lane, the site of which has been thrown into the street and dedicated to the public, though the soil is vested in the corporation. These rent-charges, as it now turns out, issue out of land which was never intended to be sold to us. Though it was stated in the conditions that some part of the property was subject to certain rent-charges, it now appears that these particular rent-charges issue out of land which formed no part of our contract. In *Beckett v. Corporation of Leeds* (1) it was doubted whether the presumption that an adjoining owner is entitled to the soil of the road ad medium filum applies to a street in a town.

[ROMER J. The origin of this rule is stated in *Doe v. Pearsey*. (2)]

This rule has never been applied to land in a town, and this land is in the City of London. In *Leigh v. Jack* (3) the land ad medium filum of an intended new street was held not to pass, because the vendor had an object in retaining it, and here the corporation require the site of 24, Shoe Lane for a public road. Surrounding circumstances may be looked at to rebut the presumption; the plan does not shew that half the street is included: this is strong evidence that it was not intended to pass: *Plumstead Board of Works v. British Land Co.* (4) The fact, too, that the corporation own the soil of Stonecutter Street rather beyond the middle of the street, also rebuts the presumption that it was intended to pass by the conveyance. Looking at all the surrounding circumstances, we say that the soil of this street did not pass by the conveyance and was never intended to pass, and on the facts as now ascertained the corporation is still liable to pay these rent-charges.

ROMER J. There is no question but that these rent-charges are payable; and the only question I have to decide is, as between

(1) (1872) L. R. 7 Ch. 421.

(3) (1879) 5 Ex. D. 264.

(2) (1827) 7 B. & C. 304.

(4) (1874) L. R. 10 Q. B. 16.



the defendant corporation and the defendant Tubbs, who is liable to pay them. [His Lordship then stated the facts, and continued:—]

Now, it appears by the contract between the corporation and the defendant Tubbs that he bought the site of the market subject to rent-charges amounting to 28*l.* 16*s.* 6*d.*, but on what particular parts of the site they were imposed was not then accurately known; and, therefore, the contract ran that the corporation contracted to sell to the purchaser the fee of the site “subject, as to some part or parts thereof,” to the rent-charges. These words appeared in the different conveyances of the different portions of the property bought because the site was not conveyed as a whole.

On that statement of facts one thing at any rate is perfectly clear, namely, that, as between the corporation and the defendant Tubbs, the defendant Tubbs ought to pay these two rent-charges for 7*l.* and 6*l.* 12*s.* 6*d.*; and I am glad to say that in my opinion I am able to do justice as between the corporation and the defendant Tubbs, for in my opinion the defendant Tubbs is legally liable to pay. The corporation in the conveyances conveyed certain portions of the site of the market which abutted on Stonecutter Street and Shoe Lane; and the property in the conveyance is described as abutting on those highways; and it appears clear that the part of the highway which abutted on the property conveyed covered the site of the houses or house on which the rent-charges in question were originally imposed. So that if the conveyance to the defendant Tubbs conveyed, not only the site of the market itself, but the site of these highways so far as they were vested in the corporation, then the land on which the rent-charges were imposed passed to the defendant Tubbs, and he was liable to pay them. The question is, Did not the site of 24, Shoe Lane, which was vested in the corporation and acquired by them under the circumstances I have mentioned, or a part of it, pass by the conveyance? Certainly, as I have already pointed out, the corporation at the date of the conveyance to the defendant Tubbs owned at least a moiety of the site of 24, Shoe Lane which had been thrown into the highway.

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Now, the general rule applicable to conveyances of properties bounding on a highway, whether or not any portion of the highway passes by the conveyance, is stated clearly by Cotton L.J. in the case of *Micklethwait v. Newlay Bridge Co.* (1), to which attention has been called; and, whatever may have been the origin of the doctrine to which I am about to refer, the law upon it is, I think, now quite settled. Cotton L.J. says this (2): "The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to shew that that is not the intention of the parties." Now, it is suggested that that general rule does not apply at all to streets in towns. I have never heard it before argued, and certainly it has never been actually decided, that the presumption does not apply to conveyances of houses bordering on streets in towns; nor do I see any sufficient reason why the general rule should not apply to streets in towns as well as to highways in the country. Why should towns be excluded? And if towns were excluded, where would you limit the exception from the rule? Would a country town be excepted? Would a small town? Would a village? Would a hamlet? Where are you to stop? It seems to me that unless there are certain circumstances connected with the particular town, the rule applies to streets in towns as it does to highways in the country.

Now, is there anything in the case before me sufficient to justify me in saying that the presumption is that the highway vested in the corporation did pass by this conveyance to the defendant Tubbs? I can find nothing sufficient to justify me in holding that the presumption that the site did pass is rebutted. As I have pointed out, the site of 24, Shoe Lane, which is vested in the corporation, was acquired by them under the same Act as the market itself: they were all obtained

(1) 33 Ch. D. 133.

(2) 33 Ch. D. 145.

practically for one purpose; and it was only as owners of the market that the corporation had obtained the soil of 24, Shoe Lane. The corporation are not the owners of the property on the other side of Stonecutter Street or Shoe Lane, or of the portion of the highway of Shoe Lane which abuts on the opposite property. Then, under the Acts to which I have referred, the corporation, being authorized to sell the market, in my opinion were justified and authorized in selling the soil of the adjacent highway so far as it was vested in them for the purposes of the Act. As I have already pointed out, the site really was vested in them substantially as owners of the market; and the statutory provision as to the sale of the site refers to the site of the market and its appurtenances; and that authority did justify and authorize the corporation in parting with the site of the market, and did include as part of that the soil of the highway of Stonecutter Street, vested in them in the manner I have mentioned. I can see no sufficient reason under these circumstances for the corporation wishing to retain the soil of the road when the market was sold. The public, of course, are not in any way prejudiced, because they have the same use of the highway whether the soil is vested in the corporation, or whether it passed to the defendant Tubbs by the conveyance to him. And it appears to me, when I remember the circumstances under which the defendant Tubbs bought, and the circumstances under which the corporation sold, namely, the difficulties at that time of ascertaining what particular portion of the property sold was charged with the rent-charges to which I have referred, that those circumstances tend to support the presumption that in this case it was intended to pass to the defendant Tubbs the whole property which the corporation had originally obtained, and as to which, owing to alterations effected by them, it had become impossible to state in detail which particular parts were subject to these rent-charges. I think the circumstances of this case, so far from tending to negative the presumption, support it.

Then it was suggested, inasmuch as the corporation appeared to own the soil of Stonecutter Street rather beyond the middle of the highway, that this in some way rebutted the presumption

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ROMER J. that the soil of the highway was intended to pass. In my opinion that makes no difference. I think that what passed by this conveyance was the soil of the highway which belonged to the corporation. I do not know that it has ever been expressly decided, but I feel myself no doubt that if A. owns houses on one side of a street, and B. owns houses on the other side, but it turns out that the soil of the highway is not evenly divided as between A. and B. according to the usual presumption, but that, say, A. owned a little more, or a little less, than half the highway, then when A. conveys his houses, describing them as bounded by the highway, by presumption of law that portion of the highway which was vested in A. would pass by the conveyance, in the absence, of course, of other circumstances tending to negative the presumption. In the ordinary case where it is said that the presumption is that the soil of the highway *ad medium filum* is intended to pass, that is because, as between owners of lands abutting on the highway between them, the presumption is, in the absence of knowledge of the precise facts, that each owner does own the soil of the highway *ad medium filum*. If it turned out that that presumption was not accurate in fact, and that, as between the owners of the properties on the opposite sides of the highway, the highway was unequally divided between the two, then the sole effect of that would be, not that it would negative the presumption that the soil of the highway passed by a conveyance by the owner of the property on the one side of the highway, but the presumption would then be that the conveyance passed the soil of the highway so far as it was vested in the conveying party.

For these reasons I hold that the defendant Tubbs is legally liable to pay these rent-charges, and I accordingly so decide.

Solicitors: *Clabon; H. H. Crawford; Leonard Tubbs.*

W. C. D.

*In re* RITSON.  
RITSON *v.* RITSON.

[1897 R. 2095.]

ROMER J.

1898

April 22.

*Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113)—Mortgage by one Partner to secure Debt of the Partnership—Devise of Real Estate—Sufficiency of Partnership Assets to answer all Partnership Debts.*

The Real Estate Charges Act, 1854, commonly called Locke King's Act, does not apply to the case of a charge created by one partner on his separate estate to secure a debt of the partnership where the partnership assets are sufficient to answer all the debts of the partnership.

IN August, 1894, John Ritson, who carried on business in partnership with his brother Thomas Smith Ritson under the style of Ritson & Co., deposited with the Cumberland Union Banking Company the title deeds relating to certain real estate at Liverpool for securing the repayment of all moneys then due and to become due by the firm, and by a memorandum of charge charged all the said real estate, and all other hereditaments belonging to him or over which he had any disposing power to which the said deeds or any of them related, with the payment of all moneys due or to become due as aforesaid. No articles of partnership between John Ritson and his brother were ever executed.

By his will dated June 21, 1897, John Ritson devised and bequeathed all his real and personal estate to trustees, being his executors thereafter named, upon trust for his wife for life, and after her decease upon trust as to certain real estate therein particularly mentioned, which included the real estate charged to the bank, for his son Robert Ritson absolutely, and as to all the residue of his real estate upon trust for sale as therein mentioned, and to stand possessed of the moneys to arise thereby, and also of his personal estate upon trust for all his (the testator's) children as therein mentioned, and appointed his brother Robert Ritson, Joseph Hayton, and Mary Jane Ritson executors of his will. There were no words exempting



ROMER J. the first-mentioned real estate from the testator's charge to the bank.

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The testator died on September 15, 1897, leaving the said Robert Ritson, his son, and three other children, who were all infants, surviving. At the testator's death the partnership was largely indebted to the Cumberland Bank in respect of overdrafts allowed to the partnership.

By certain agreements made between the executors of the said John Ritson of the one part, and Thomas Smith Ritson of the other part, with the sanction of the Court, for the division of the assets and the winding up of the partnership business, it was, amongst other things, agreed that the debt due to the bank, amounting to about 17,000*l.*, should be paid by the executors of John Ritson and the said Thomas Smith Ritson in proportion to the shares in which the testator and his brother were entitled to the business. The partnership assets were more than sufficient to answer the debt due to the bank and all the other debts of the partnership.

This was a summons taken out by the executors and trustees of John Ritson against the beneficiaries under the will for determining the question, amongst others, whether such part of the amount due from the partnership to the bank and secured by the memorandum of deposit as was payable by the estate of John Ritson ought to be paid out of the real estate of John Ritson mentioned in the memorandum of deposit, or out of his share of the assets of the partnership.

*R. F. Norton*, for the trustees and Robert Ritson, the son. The question in this case arises on Locke King's Act (17 & 18 Vict. c. 113), which provides that where a person shall die seised of any estate or interest in land charged with the payment of money by way of mortgage, and such person shall not by his will or other deed or writing signify any contrary or other intention, the heir or devisee to whom such land shall descend shall not be entitled to have the mortgage debt discharged out of the personal estate or other real estate of such person, but the land so charged shall, as between the different persons claiming through or under the deceased, be primarily

liable to the payment of all mortgage debts with which the same shall be charged. I submit that this case is not one which falls within the Act. The debt to the bank was not the testator's debt, but was a debt of the partnership. The assets are not the testator's assets, but partnership assets, and the devisee is not claiming to have the debt satisfied out of the personal estate. The case is not one "between the different persons claiming through or under the deceased person." I submit, therefore, that the real estate comprised in the memorandum of deposit is not liable to pay the proportion of the debt payable by the testator's estate.

*Christopher James*, for the remaining children of the testator. I submit that this case falls within the Act, and that the real estate devised to the eldest son is liable to bear the proportion of the debt due to the bank which has to be borne by the testator's estate. The words of the Act are precise, and the testator has not signified "any contrary or other intention." Suppose the testator had been carrying on business as an individual under the name of a firm with a separate banking account for the business, and had secured the account by a deposit of deeds: in that case the real estate would have borne the debt. It ought not to make any difference that the testator has a partner possibly with a small or no share in the capital or losses. The debt was a debt of the testator, a joint debt during his life, and, under s. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), a liability on his estate after his death. I submit, therefore, that Locke King's Act applies.

ROMER J. I feel myself no difficulty about this case. The debts of the partnership are not the testator's debts, neither are the assets of the partnership the testator's assets. The devisee is not claiming to have the mortgage debt satisfied out of the testator's personal estate. The case, therefore, is not one "between the different persons claiming through or under the deceased person" within the meaning of the words of the Act. The only right of the executors is to have paid over to them the testator's share of the surplus assets of the partnership. What the devisee says is that the partnership assets are

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ROMER J. primarily liable to discharge the mortgage debt, and he is insisting that they ought to be made to bear it just in the same way as the surviving partner could have insisted on the partnership assets being applied to pay off partnership debts. If the surviving partner had done that, I fail to see how, when he had done so, the executors would have had any right to make the devisee account. I repeat what I said in the course of the argument, that I am not deciding what ought to have been done if the partnership assets had not been sufficient to pay the debts in full. If the bank could not have obtained payment, a very different question would have arisen. The executors might then have said to the devisee, "You must indemnify us against the bank's claim."

I have no difficulty in holding that the specific devisee under the circumstances of this case takes the real estate comprised in the memorandum of deposit free from the liability of contributing to the payment of the overdraft to the bank.

Solicitors: *Speechly, Mumford & Rodgers, for Hayton & Simpson, Cockermouth.*

G. M.

## EHRMAN v. BARTHOLOMEW.

[1898 E. 275.]

ROMER J.

1898

April 1, 26.

*Injunction—Contract of Service—Agreement to Devote Whole Time—Negative Stipulation—Breach of Contract.*

A traveller for the plaintiffs, a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business, or transact any business with any other person or persons than the plaintiffs for a term of ten years. The traveller having left the plaintiffs' employ and entered that of another firm, the plaintiffs moved for an injunction to restrain him from engaging in any other business, and from acting as a traveller for any other firm of wine merchants during the term of ten years:—

*Held*, that the negative stipulations in this contract were unreasonable and ought not to be enforced, and that the application must therefore be refused.

## MOTION.

In August, 1897, the defendant entered the employ of the plaintiffs, a firm of wine merchants, as a traveller at a salary, under the terms and conditions of an agreement which, so far as material, provided, that the employment should continue for a term of ten years from August 30, 1897, and be terminable by the plaintiffs after the first year by three months' notice in writing. Clause 3 of the agreement was as follows: "The traveller shall diligently and continuously employ himself as the traveller of the firm for the purpose of selling the firm's goods, and shall use his best endeavours to obtain new customers for the firm, and to extend business, and shall devote the whole of his time during the usual business hours in the transaction of the business of the firm, and shall not in any manner directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the firm during the continuance of this agreement."

The agreement also provided (clause 13) that after the termination of the employment by any means, the defendant

ROMER J. should not, either on his sole account or jointly with any other person, directly or indirectly supply any of the then or past customers of the firm with wines, liqueurs or spirits, or solicit for orders any such customers; and should not be employed in any capacity whatsoever, or be concerned, engaged or employed in any business of a wine or spirit merchant in which any former partner of the firm was engaged; and in case of any breach of this provision, then the defendant was to pay the firm 1000*l.* as liquidated damages.

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In March, 1898, the defendant left the plaintiffs' employment and entered the service of another firm of wine merchants. The defendant wrote resigning his place with the plaintiffs; but they declined to accept his resignation, and commenced the present action, by which they claimed an injunction to restrain the defendant from "in any manner directly or indirectly engaging or employing himself in any business other than that of the plaintiffs' firm, and from transacting any business with or for any person or persons other than the plaintiffs' firm, and in particular from acting as a traveller for Messrs. Marzell & Co., and from soliciting orders for and on behalf of the said Messrs. Marzell & Co. during the term of ten years from August 30, 1897."

The plaintiffs now moved for an interim injunction in the terms of their claim.

*H. E. Wright*, for the plaintiffs. The defendant has agreed to be our traveller during a term of ten years, and during that period to devote the whole of his time to our business; and then comes the negative covenant not to engage in any other business, and not to work for any other persons during this period. This negative stipulation distinguishes this case from *Whitwood Chemical Co. v. Hardman*. (1) The agreement is still subsisting, and we are entitled to an injunction to restrain the defendant from breaking the negative part of his contract: *Lumley v. Wagner*. (2)

*Buckmaster*, for the defendant. This is an attempt to enforce

(1) [1891] 2 Ch. 416.

(2) (1852) 5 De G. & Sm. 485; 1 D. M. & G. 604.



specific performance of a contract for personal service—a thing that the Court will not do. Clause 3 is void, and cannot be enforced: it is far too wide in its terms; its effect is to restrain the defendant from all work of any kind during these ten years except as traveller for the plaintiffs, and it is not possible to sever the illegal from the legal portion of this stipulation: *Baker v. Hedgecock*. (1) This clause cannot, as in *Mills v. Dunham* (2), be cut down or limited to a reasonable restraint of trade: it is far too wide for that. It is so unreasonable that it ought not to be enforced.

*Wright*, in reply. The agreement must be construed reasonably. The spirit and true meaning of it does not go further than is necessary to give reasonable protection to the persons imposing it. It is not intended to be in general restraint of trade; it is only intended to prevent the defendant from travelling for other persons while in our employ.

[*De Mattos v. Gibson* (3) was also cited.]

*Cur. adv. vult.*

April 26. ROMER J. In my opinion the injunction asked for by the notice of motion ought not to be granted. The application is based on clause 3 of the agreement between the parties, which contains a negative stipulation, and so far distinguishes this case from that of *Whitwood Chemical Co. v. Hardman*. (4)

In the first place, having regard to clause 13, I doubt whether clause 3 was intended to apply to the state of things now existing, when the defendant is no longer acting as a servant of the plaintiffs, and cannot be compelled so to act, though his refusal to do so is in breach of his contract to act for the ten years mentioned in the agreement. But if I assume that clause 3 was intended to apply to the existing circumstances, then the serious question arises whether the Court ought to enforce such a negative stipulation as is there contained. That clause would in terms prevent the defendant,

(1) (1888) 39 Ch. D. 520.

(3) (1858) 4 De G. & J. 276.

(2) [1891] 1 Ch. 576.

(4) [1891] 2 Ch. 416.

ROMER J.

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ROMER J. at any rate during the usual business hours, from engaging or  
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LOMEW.  
—  
employing himself in any business other than that of the  
plaintiffs, and from transacting any business with or for any  
person or persons other than the plaintiffs; and this for a  
period of ten years from August 30, 1897, or for so much of  
that period as the plaintiffs choose. And it is clear that in  
this clause the word "business" cannot be held limited by the  
context to a wine merchant's business or in any similar way.  
So that the Court, while unable to order the defendant to work  
for the plaintiffs, is asked indirectly to make him do so by  
otherwise compelling him to abstain wholly from business, at  
any rate during all usual business hours. In my opinion such  
a stipulation is unreasonable and ought not to be enforced by  
the Court. As the present Master of the Rolls stated in  
*Whitwood Chemical Co. v. Hardman* (1), cases where negative  
stipulations in contracts of service are enforced by the Court  
ought not to be extended, and are to be regarded as anomalies  
which it would be very dangerous to extend. To enforce such  
a general negative stipulation as I find here would be in my  
opinion a dangerous extension, for here the stipulation extends  
to business of any kind, while the negative stipulations enforced  
in the prior cases, such as *Lumley v. Wagner* (2), were confined  
to special services. For these reasons I refuse the motion, but  
looking at the conduct of the defendant, I do so without costs.  
Of course by this order the plaintiffs will in nowise be pre-  
vented from enforcing clause 13 of the agreement should they  
think fit to do so.

Solicitors: *W. H. Southern; Goren & Tapp.*

(1) [1891] 2 Ch. 416.

(2) 5 De G. & Sm. 485; 1 D. M. & G. 604.

W. C. D.

## HUNT v. FRIPP.

BYRNE J.

[1896 H. 1623.]

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Nov. 10, 11, 12.

*Bankruptcy—Undischarged Bankrupt—After-acquired Property—Assignment of Interest under Will—Bona fides—Colonial Law—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54.*

The proposition laid down in *Cohen v. Mitchell*, (1890) 25 Q. B. D. 262—that until his trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, are valid against the trustee—applies where the after-acquired property consists of a legacy and a share of residue under a will, even where the trustee intervenes before the bequeathed property has reached the hands of a bonâ fide equitable assignee.

An assignment of the future-acquired property is not necessarily malâ fide because at the time the assignee has knowledge of the assignor's bankruptcy and of the ignorance of the trustee in bankruptcy that the bankrupt has acquired the assigned property.

The law is the same on this point in the Colony of Victoria.

ONE Welch was carrying on business in the Colony of Victoria, first as agent for the plaintiffs in the present action, who were carrying on business in London, and afterwards upon his own account. Welch was furnished by them from time to time with goods, and became indebted to them in a considerable amount. Emery, who was Welch's brother-in-law and had some business relations with him, but was not his partner, carried on business in Melbourne, in the Colony of Victoria, prior to 1892. On April 23, 1892, Emery filed his petition in insolvency in the colony. A sequestration order was made on the petition, and subsequently the defendant Cohen was appointed assignee in the insolvency.

On March 4, 1893, before Emery obtained his order of discharge, his father died in England, having by his will given Emery a legacy and a share of his residuary property; and on March 5, 1893, a letter was sent to Emery giving him information that he was entitled to some property under the will. Emery did not communicate any information on the subject to

BYRNE J. Cohen, and on September 15, 1893, obtained his order of discharge. Welch being desirous of going to Tasmania, in May, 1894, three documents were executed, the short effect of which was that Emery agreed to take over Welch's business and stock-in-trade, and collect the larger debts and account for them to Welch, Emery becoming owner on payment of the whole of several instalments. At that time Welch was indebted to plaintiffs to the amount of about 5000*l*.

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In March, 1895, Welch assigned to the plaintiffs all the debts and sums of money coming to him from Emery, including several unpaid instalments under the above-mentioned documents, and notice of that assignment was duly given to Emery.

In June, 1895, Emery by deed made a valid equitable assignment to the plaintiffs of all his interest under his father's will, the document being really an agreement for the absolute sale of it in consideration of 900*l*. The interest under the will was of the value of about 900*l*., but there was at the time a much larger sum due from Emery to the plaintiffs. Notice of this assignment was given to the executors of the will on July 31, 1895.

The plaintiffs at this time knew of Cohen's ignorance as to the interest taken by Emery under his father's will; but Byrne J. at the trial of the action held that the utmost that could be said against the plaintiffs, as shewing want of bona fides in them, was that they had a strong suspicion that there were outstanding creditors of Emery under an old insolvency who, if they thought it worth their while, might reopen the insolvency, make a claim, and put the assignee in motion. The plaintiffs applied to the executors of Emery's father for payment of the legacy and share of residue, but the executors, being aware of the insolvency, refused to make payment.

An action to obtain payment was subsequently brought against the executors, and Cohen, who claimed the money as assignee, was subsequently joined as a defendant to the action. The money claimed was paid into court by the executors. At the trial Mr. Butterworth (whose evidence is more particularly referred to in the judgment of Byrne J., from which

the above stated facts are in substance taken), as a legal expert, gave evidence that the decisions of the Court of Appeal in England were looked upon with the greatest respect in the Australian Courts, and that in substance English decisions were regarded on questions arising on the construction of Colonial statutes similar to Imperial statutes. [He referred in particular to *Trimble v. Hill*. (1)]

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*Eve, Q.C.*, and *M. Muir Mackenzie*, for the plaintiffs. The expert evidence shews that the law of Victoria in circumstances like those of the present case is exactly the same as the English bankruptcy law. The title of the plaintiffs, according to English law, to the property assigned, is better than that of Cohen, the assignee. In the first place, the plaintiffs have given valuable consideration for the property, and in the next place they have acted bonâ fide, and, as Cohen did not intervene, the transaction between Emery and the plaintiffs is protected, although Emery had not obtained his discharge when his father's will took effect: *Cohen v. Mitchell* (2); *In re Rogers*. (3) This is not the case of a dispute between the trustees of two bankruptcies of the same individual, like *In re Clark* (4), but the case of a dispute between the equivalent of a trustee in bankruptcy of a trader and a person dealing with the trader after his bankruptcy.

The doctrine of *Cohen v. Mitchell* (2), although it does not apply to freeholds, extends to leaseholds: *In re Clayton and Barclay's Contract*. (5) And, as pointed out by Chitty J. in the case last cited, "the language of the Court of Appeal in *Cohen v. Mitchell* (2) is large enough to include all property."

*Atherley-Jones, Q.C.*, and *W. Compton-Smith*, for Cohen. Where transactions with undischarged bankrupts have been held to confer a good title against the trustee in bankruptcy, the ground has generally been that the trustee has not intervened. But in this case the assignee is not prejudiced by his intervention as he was unaware of the legacy to Emery: *Meggy*

(1) (1879) 5 App. Cas. 342.

(3) [1894] 1 Q. B. 425, 432.

(2) 25 Q. B. D. 262.

(4) [1894] 2 Q. B. 393.

(5) [1895] 2 Ch. 212, 215.



BYRNE J. v. *Imperial Discount Co.* (1) The plaintiffs knew of this ignorance of the assignee, and cannot therefore be held to have acted bonâ fide. According to Lord Esher M.R., the ordinary law on the subject is still to be found in *Ex parte Ford* (2), *Cohen v. Mitchell* (3) being an exceptional case: *In re Clark*. (4) It was Emery's duty to inform the assignee that a legacy had been left to him, and as the plaintiffs knew that Emery had failed in his duty and nevertheless chose to deal with him, they were in so doing acting malâ fide. In this case the property has not been paid away to the plaintiffs, and as the money is in court, and did not leave the executors' control until after the assignee had made his claim, his intervention is not too late: *Ex parte Dewhurst* (5); *Wadling v. Oliphant*. (6)

The plaintiffs have failed to sustain the onus, which is on them, to prove that valuable consideration was given and that the transaction was in good faith: *Tatam v. Haslar*. (7)

[They also referred to *Jones v. Gordon* (8); *Tucker v. Herniman* (9); *Pickard v. Sears*. (10)]

*Eve, Q.C.*, in reply, referred to *Butcher v. Stead*. (11)

*R. F. Norton*, for the executors of Emery's father.

*Cur. adv. vult.*

1897. Nov. 12. BYRNE J. In this case an action has been brought to determine the right of a particular assignee of an insolvent who after his discharge assigned property which devolved upon him prior to his discharge. [His Lordship stated the facts, and continued:—]

The real question that I have to determine in the case is whether there is a better title in the assignee in the insolvency than the title which was acquired by the plaintiffs under their assignment.

The first matter I have to refer to is this. The question is one as to the law of Victoria, which of course is before me a

(1) (1878) 3 Q. B. D. 711.

(2) (1876) 1 Ch. D. 521.

(3) 25 Q. B. D. 262.

(4) [1894] 2 Q. B. 393, 404.

(5) (1871) L. R. 7 Ch. 185.

(6) (1875) 1 Q. B. D. 145.

(7) (1889) 23 Q. B. D. 345.

(8) (1877) 2 App. Cas. 616.

(9) (1853) 4 D. M. & G. 395.

(10) (1837) 6 Ad. & E. 469.

(11) (1875) L. R. 7 H. L. 839.

question of fact, and I have heard expert evidence upon the subject. Mr. Butterworth, who is an advocate of a neighbouring colony, but is also acquainted with the law of Victoria, is accepted as a good expert on the subject, and no objection is suggested to his evidence. The effect of his evidence is, and that now is common ground, that there is no material difference between the phraseology of the Victorian statute law and the English Bankruptcy Act so far as concerns the matters with which I have to deal; that, although not in the strict sense of the word binding, the decisions of the Court of Appeal in England are regarded with the highest respect in the Courts in the colonies, and that substantially you are entitled to look at the English decisions in matters turning upon the construction of similar statutes as giving the law which, should the precise point arise, the Courts in the Australian colonies would act upon. And the witness points out that the Privy Council in *Trimble v. Hill* (1) have stated that "their Lordships think the Court in the colony might well have taken this decision"—namely, the decision of the Court of Appeal in *Diggle v. Higgs* (2)—"as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. The judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of *Hogan v. Curtis* (3), but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle v. Higgs* (2), as the English Court which decided *Batty v. Marriott* (4) would have felt bound to do if a similar case had again come before it." I think the observations of the Privy Council in that case apply to a case like this, where the insolvency statute is for this purpose substantially the same as the English

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(1) 5 App. Cas. 342, 344.

(3) (1867) 6 N. S. W. Sup. Court

(2) (1877) 2 Ex. D. 422.

Rep. 292.

(4) (1848) 5 C. B. 818.

BYRNE J. Bankruptcy Act. The evidence of Mr. Butterworth went further than that, and it is to this effect—that according to the law of Victoria, in his opinion, the decision of the Court of Appeal in *Cohen v. Mitchell* (1), as explained and dealt with in subsequent cases, truly represents the law of Victoria in reference to this matter.

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In my judgment the principal inquiry to be made is whether the facts of the present case bring it within the decision in *Cohen v. Mitchell* (1), having regard to the way in which that case has been dealt with in certain other decisions. What was laid down in *Cohen v. Mitchell*? (1) Put shortly, it is a decision that where a bankrupt who has not obtained his discharge enters into transactions in respect of property acquired after his bankruptcy, then, until the trustee in bankruptcy intervenes, all such transactions with any person dealing with him *bonâ fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee. That is the effect of the written proposition agreed upon in *Cohen v. Mitchell* (1) by all the judges of the Court of Appeal (2), and meant to give new expression to the old law. Lord Esher M.R. says: “I admit that, in terms, we are laying down a proposition wider than appears to have been laid down before. I say ‘in terms’ because what has been laid down before involves a principle which supports the proposition to its full extent.” I do not consider that the Court of Appeal in *Cohen v. Mitchell* (1) meant to lay down a proposition which should throw doubt upon the decision in *Ex parte Ford* (3); and that indeed is the view which has been since taken, as I read it, by the Court of Appeal. You must read the proposition given by the Court of Appeal in *Cohen v. Mitchell* (1) by the light of the decision in *Ex parte Ford* (3), and of a subsequent decision to which I shall presently refer, and also by the light of this—that it is now decided that the proposition referred to was not meant to apply to the case of real estate, but that it was meant to apply to the case of leasehold estate.

Can I draw any distinction in this case because the property

(1) 25 Q. B. D. 262.

(2) 25 Q. B. D. 267.

(3) 1 Ch. D. 521.

in relation to which the dispute arises is money in the hands of trustees which has never been paid over to the debtor, but has been paid into court by the trustee to abide a decision as to the rights of the parties? This is undoubtedly an important question; but I find no sufficient ground for so limiting the proposition laid down in *Cohen v. Mitchell*. (1) That proposition is laid down in general terms, and Chitty J. in the later case of *In re New Land Development Association and Gray* (2) speaks of choses in action and other personal estate belonging to the bankrupt, and goods and chattels, as being within the decision of *Cohen v. Mitchell*. (1) I do not, therefore, feel justified in drawing so refined a distinction as to say that because in the present case the money is outstanding, and has not got into the hands of the persons by whom the assignment was made, that constitutes a valid distinction. I ought, before I pass on, to refer to *In re Clark* (3), which has been since decided by the Court of Appeal. That case was like *Ex parte Ford* (4), arising, as it did, not between a particular assignee and the trustee in bankruptcy, but between two trustees in bankruptcy, the debtor there having become bankrupt twice: that is to say, it was a case as between two general assignees, and therefore distinguishable from *Cohen v. Mitchell*. (1) This is clearly a material distinction, and it was so regarded by the learned judges in their judgment in *In re Clark*. (3) I find that Davey L.J. (at p. 409 of the report in the LAW REPORTS) states the rule as given in *Cohen v. Mitchell* (1) and in the same terms, and then he says: "That is a very beneficial and, I have no doubt, a very just rule, as regards the rights of third parties dealing bonâ fide and for value with the bankrupt after his bankruptcy. But nothing which was there laid down touches the question of the rights of the trustee in a first bankruptcy, under the circumstances of the present case, as against the trustee in a second bankruptcy. In my opinion that question is conclusively settled for us by *Ex parte Ford* (4), a decision of the Court of Appeal which binds us." Then he says: "I do not think that decision was overruled or in any way

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(1) 25 Q. B. D. 262.

(2) [1892] 2 Ch. 138.

(3) [1894] 2 Q. B. 393.

(4) 1 Ch. D. 521.

BYRNE J. impeached by *Cohen v. Mitchell*.” (1) Then (2) he points out that, “The general assignee of all a bankrupt’s property stands, in my opinion, in a very different position from a particular assignee for value, and I greatly doubt whether a general assignee of all a bankrupt’s property is within the principle of the rule which was laid down in *Cohen v. Mitchell*.” (1) In *In re Clark* (3) the rule laid down in *Cohen v. Mitchell* (1) is duly recognised, having regard to what was intended to be done by that rule; but that rule was not intended to reverse or overrule what had been decided in *Ex parte Ford*. (4)

The reported cases, therefore, leave me this point for consideration: Can the transaction which took place in this case be fairly considered as a dealing *bonâ fide* and for value? I do not think that anything can be said—and very properly little argument has been brought to bear upon that point—as to whether this could be considered a transaction for value, assuming that the earlier transactions upon which it was founded were valid and effectual and not tainted with fraud. It cannot, in my judgment, be maintained that there was not a sufficient sum due to make a good consideration. I have, therefore, only one question to decide, and that is whether the transaction was *bonâ fide* within the meaning of the rule in *Cohen v. Mitchell*. (1) “It will be seen,” says Lord Esher (5), “I think, from the wording of that proposition, that the stress of *bona fides* is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question of whether the bankrupt, as between himself and the creditors, is also dealing in good faith is immaterial.” I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying “dealing *bonâ fide*” is equivalent to saying “dealing honestly,” and that what I really have to consider is, Were the plaintiffs behaving honestly when they took the assignment in question from

(1) 25 Q. B. D. 262.

(3) [1894] 2 Q. B. 393.

(2) [1894] 2 Q. B. 410.

(4) 1 Ch. D. 521.

(5) 25 Q. B. D. 267.

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Emery? I think the answer to that question must be Yes. In my judgment there is no obligation upon parties dealing with an undischarged bankrupt or with a discharged bankrupt, although they know of the fact that he has been a bankrupt either discharged or undischarged, to go to the trustee to make inquiries. I think so much will be conceded. There is nothing dishonest in a man dealing fairly with a bankrupt as he would with any other customer.

I look at the origin of the transaction, and I confess that I do not think I can fairly infer that the original transaction between Welch and Emery was tainted with fraud. There are many improbabilities about the matter which strike me in coming to the conclusion. Welch and Emery were brothers-in-law. Emery was expecting to be paid something from his father's estate. Emery believed that no creditor under his own bankruptcy, even if he legally could, would take what he conceived to be the necessary proceedings, after so long a lapse of time, to try and get the bankruptcy reopened. Emery thought that the business was one that he could carry on at a profit. I cannot impute to Welch that he did not share the like belief, and impute to him further that he wished to put upon his brother-in-law the indebtedness of a business which would have the effect of crushing him. I think they were both sanguine, and both believed that the business would be a successful one; and I cannot draw the inference with reference to the original transaction which I am asked to do. Then I have to consider the position of the plaintiffs during the progress of the negotiations which culminated in the assignment. Certainly for a long period, down to at least the month of, I think, January, 1895, nothing, so far as I can see, could be said against their bona fides or honesty unless it was dishonest on their part not to go to the assignee or give him notice that Emery was proposing to deal with the legacy. I do not think that they were called upon to do so, and I do not think there was anything dishonest in their not doing so, and I think, going even to a further date than that, that the utmost that could be said against the plaintiffs, and from which I could draw any sort of inference, would be that they had ultimately a strong suspicion

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BYRNE J. that there were outstanding creditors of Emery under an old  
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bankruptcy who, if they thought it worth while to do so, and did so, might reopen the bankruptcy and make a claim, and put the assignee in motion. It has been said, and truly said, that it appears from the correspondence that Emery did not go and tell the assignee about this matter, and that he was in that sense concealing from the assignee the fact that he had this legacy. I am not dealing with any question as between Emery and his creditors now except as to the fairness of the transaction. I think the reasonable inference to draw on the whole of these facts is that the plaintiffs were dealing honestly—that is, that they were dealing *bonâ fide* within the meaning of the decision in *Cohen v. Mitchell*. (1)

In the result, I hold that the plaintiffs are entitled to succeed. (2)

Solicitors for plaintiffs: *Whites & Co.*

Solicitors for defendants: *Leslie & Hardy, for Henry Pettit, Leighton Buzzard; H. A. Graham.*

(1) 25 Q. B. D. 262.

judgment of Byrne J., but the case

(2) An appeal was brought from the

was ultimately compromised.—F. E.

## DANIEL &amp; ARTER v. WHITEHOUSE.

[1897 D. 148.]

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BARNES J.

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*Trade Name—Former Concurrent User by Two Firms—Discontinuance of User by One for several Years.* March 17, 18,  
22.

Where there has been a concurrent user of a trade name by A. and B., but the user thereof by B. has practically ceased for some years, and A. has in the meantime acquired a large sale for his goods and a reputation in the market under the trade name, so that the name has become associated solely with the goods of A., B. may not afterwards revive the use of the name in his business in such a way as to pass off his goods as those of A.

THIS action was commenced by the plaintiffs, who carried on the business of electro-plate manufacturers at Birmingham and London, to restrain the defendants, who carried on the same trade at Birmingham, from passing or attempting to pass off goods such as spoons and forks not of the plaintiffs' manufacture as and for the goods of the plaintiffs by the use of the term "Brazilian Silver," or in any other way.

The plaintiffs by their statement of claim alleged that in the year 1881 they began to manufacture and sell spoons, forks, and other articles made from a particular alloy of nickel and other metals under the fancy name of "Brazilian Silver"; that they had always used that term to distinguish and denote the articles so manufactured and sold by them on invoices, circulars, and price lists, and also by stamping the words "Brazilian Silver" upon the articles themselves; that the term "Brazilian Silver" had ever since its introduction by them denoted and been understood by the trade and the public to denote articles of their manufacture and no other articles, and that persons asking for spoons, forks, and other articles under the title of "Brazilian Silver" meant and intended to be supplied with their articles and no others; that in the year 1886 they for the first time discovered that the defendant Whitehouse had recently sold a small lot of spoons and forks not of the plaintiffs' manufacture under the title of "Brazilian Silver," but that he had

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discontinued the sale ; that shortly before the commencement of this action the plaintiffs for the first time discovered that the defendant Britton was selling and offering for sale spoons and forks not of the plaintiffs' manufacture under the title of "Brazilian Silver," which he stated he had bought from the defendant Whitehouse, and that Whitehouse was selling such spoons and forks to other persons other than the defendant Britton invoiced as and put up in packages bearing labels headed "Brazilian Silver," the tablespoons having the words "Brazilian Silver" marked thereon in the same place and manner as on the tablespoons of the plaintiffs ; and they further alleged that the use by the defendants of the term "Brazilian Silver" was calculated and intended to deceive the trade and the public, and to lead to articles of the defendant's manufacture being sold and passed off as the goods of the plaintiffs. The defendants by their statement of defence alleged that the term "Brazilian Silver" had been used by the defendant Whitehouse continuously ever since the year 1885 ; that such description was well known as applying to goods of his manufacture, and not to denote articles of the plaintiffs' manufacture.

It appeared from the evidence taken in court that from 1881 to 1883, under some arrangement with one Elkan, the plaintiffs made spoons and forks and other articles for him with his name marked upon the goods, and also marked with the words "Brazilian Silver," but that they did not make or sell the goods generally, and that in 1883 that business was stopped ; that in December, 1885, the plaintiffs applied to have a trade-mark of the words "Brazilian Silver" with a device round them registered, and that the application was granted, and that from some time in 1886 to the present they had continued to sell this class of goods to a large number of people all round the country, and that their sales had amounted to about 5000*l.* a year, and that the words "Brazilian Silver" were well known in the trade as applicable to the plaintiffs' goods and to the plaintiffs' only ; that in April, 1885, Whitehouse applied for the mark "Brazilian Silver" without anything else to be registered as his trade-mark, but the application was refused ; that Whitehouse, however, proceeded to sell from that time

goods which were similar in kind to those which were manufactured by the plaintiffs with the words "Brazilian Silver" marked on them; that in 1885 he sold goods to the extent of about 150*l.*; that in 1886 the sales increased to about 800*l.*, but that in 1887 the sales practically died out, as the plaintiffs' goods were in the market and they were underselling him; and that between that year and 1894 there were very few sales, and none at all in 1894; and after that year that there were no sales by the defendant Whitehouse except the sales to Britton which had taken place for the past three years.

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*Bousfield, Q.C., John Cutler, Q.C., and Schiller*, for the plaintiffs. The law is clear that no man has a right to pass off his goods for sale as the goods of a rival trader, and cannot therefore be allowed to use names or marks by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person: *Ford v. Foster* (1); *Powell v. Birmingham Vinegar Brewery Co.* (2); *Reddaway v. Banham.* (3) This case differs from any of the reported cases in this, that it cannot be disputed that during a certain period the plaintiffs and the defendant Whitehouse were both using the name "Brazilian Silver," and marking their goods with that name upon them. We began to use the name in 1881, and although for some reason or other for a short period from 1883 to 1886 we did not manufacture articles under that name, we did not give up our right to do so, because in December, 1885, we applied to register the name. When in 1886 we discovered that Whitehouse was selling goods under that name we did not interfere with him as we learnt his sales were very trifling, and although these sales increased in amount for a year or two after that, the sales practically ceased in 1894. Between 1886 and 1894 it is clear from the evidence that the only goods known to the trade as "Brazilian Silver" were goods of our manufacture, and that the name as representing goods of the defendant had entirely died out. Under these circumstances we submit that the defendants have no right now to the use of

(1) (1872) L. R. 7 Ch. 611.

(2) [1894] 3 Ch. 449.

(3) [1896] A. C. 199.



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the name, and that we are entitled to the injunction we ask for, with an inquiry as to damages.

*Walter*, for the defendants. Up to December, 1885, the plaintiffs had no goodwill in the name "Brazilian Silver." The evidence shews that between 1881 and 1883 only thirteen orders for goods under that name were executed by them, and that between September, 1883, and February, 1886, no sales at all took place. We applied to register the name as early as April, 1885, and, although we were unsuccessful, we began to sell goods under that name with the full knowledge of the plaintiffs, and we had an increasing sale till the plaintiffs put their goods on the market and, by selling at a lower price, cut our goods out. I submit that the plaintiffs have no exclusive right to the trade name "Brazilian Silver," and that, although for a short period we did not sell any goods under that name, yet, as at one time we were both dealing in goods under that name, we are not now to be restrained from again selling them under that name.

*Bousfield*, Q.C., in reply.

*Cur. adv. vult.*

March 22. GORELL BARNES J. This is an action brought by the plaintiffs substantially to prevent the defendants from selling goods as "Brazilian Silver" so as to represent that the goods they sell are the goods of the plaintiffs. The facts are short, and the law applicable to the case appears to me to be free from any doubt—in fact, there was no dispute about it before me, and it depends upon the proposition that it is unlawful for any man to represent his goods in selling them or dealing with them as the goods of another person. [His Lordship then stated the facts, and proceeded :—]

The plaintiffs say that they have acquired in the trade the reputation for making these goods with the words "Brazilian Silver" upon them, and that those words are identified with their name as makers by those persons who are engaged in the trade; that although the defendant Whitehouse did at one time, eleven or twelve years ago, do some business in this article, that business died out, and that at the time these

proceedings were commenced the plaintiffs alone were known to the trade world and through the trade to the public as makers of this particular class of goods, and that this particular class of goods was associated with their name wherever the words "Brazilian Silver" were found.

The evidence adduced by the plaintiffs has been directed to establish the statements in the 6th paragraph of the claim that "The term 'Brazilian Silver' has ever since its introduction by the plaintiffs as aforesaid denoted and been understood by the trade and the public to denote articles of the manufacture of the plaintiffs and no other articles, and persons asking for or ordering spoons, forks, and other articles under the title of 'Brazilian Silver' mean and intend to be supplied with the plaintiffs' said articles and no others." The case set up by the defendants is in the 4th paragraph of their defence, in which they say, "The said term 'Brazilian Silver' has been used by the defendant Whitehouse continuously ever since the year 1885. Such description is well known as applying to goods of the said defendant's manufacture, and not to denote articles of the manufacture of the plaintiffs." The two cases are presented substantially by those two paragraphs.

I think the evidence which has been produced on the part of the plaintiffs really concludes the matter, and shews that they have established their case.

My opinion is, taking the case as a whole, that the plaintiffs have established their position, and that the case falls within the well-known class of authorities which have been referred to in the course of the argument, which decide that a person who has acquired a right by user to consider a certain description of goods as identified with his name is entitled to prevent other people who use that name from using it so as to pass goods off to the public and buyers as goods made by him. Although I do not find any case precisely like this case, because there was a time at which both these people were making goods in the same way (though it does not seem to have been proved that they were made of precisely the same alloy), yet still it seems to me that if a trade drops out of the use of a party, as it has done in this case out of the defendant's use, and

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while that state of things prevails another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark and the mark associated with his name, so that everybody who deals in the goods considers that when they see the mark they see goods made by that particular maker, then the original position of the competitor using the same mark has practically disappeared. I think for these reasons that the plaintiffs are entitled to the injunction which they claim; and I take it that that injunction will be substantially in the form which was adopted in the "Yorkshire Relish" case (*Powell v. Birmingham Vinegar Brewery Co.* (1) ), namely, that the defendant is not to be allowed to use this name in connection with or as descriptive of his goods without so distinguishing them from the plaintiffs' goods so that nobody may mistake the one for the other.

Solicitors: *C. Urquhart Fisher; Beale & Co.*

(1) [1894] 3 Ch. 449.

G. M.

*In re* AURIFEROUS PROPERTIES, LIMITED.

WRIGHT J.

[0027 of 1896.]

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April 1;  
May 4.

*Company—Winding-up—Creditor-Contributory—Insolvent Company holding Shares—Set-off of Debt against Calls—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 16, 38, 101—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.*

The G. Company, Limited, held shares in the A. Company, Limited, and before either company went into liquidation calls were made on the shares, and the A. Company became indebted to the G. Company for money lent.

The A. Company was ordered to be wound up by the Court, and the G. Company, being insolvent, passed an extraordinary resolution for voluntary winding-up:—

*Held*, that s. 10 of the Judicature Act, 1875, did not enable the liquidator of the G. Company to set off the debt against the calls.

IN January, 1896, the Auriferous Properties, Limited (below called the Auriferous Company), became indebted to the African Gold Properties, Limited (below called the Gold Company), in the sum of 2775*l.* for cash paid on account and at the request of the former, against which certain securities were handed over.

The Gold Company was a shareholder in the Auriferous Company, and was indebted to it in respect of two calls of 5*s.* per share made in January and June, 1896, upon the 2500 shares in the Auriferous Company.

On December 19, 1896, an order was made for the winding-up of the Auriferous Company by the Court.

On January 20, 1898, the Gold Company passed an extraordinary resolution for voluntary winding-up; and on January 26, 1898, an order was made continuing the voluntary winding-up under the supervision of the Court. The Gold Company was insolvent. The Gold Company proved its claim for debt in the winding-up of the Auriferous Company.

The Gold Company by its liquidator raised, by summons taken out in the winding-up of the Auriferous Company, the question whether the debt owing to it by the Auriferous Company could be set off against the calls due by it to the

WRIGHT J. Auriferous Company. This summons was afterwards amended by being further intituled in the matter of the winding-up of the Gold Company, and was adjourned into court and heard by Wright J.

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*George R. Northcote*, for the Gold Company. The Gold Company is insolvent, and is therefore entitled, under s. 10 of the Judicature Act, 1875, to set off the debt due to it against the calls due from it.

By that clause, in the winding-up of an insolvent company under the Act of 1862, "the same rules shall prevail and be observed . . . as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

By s. 38 of the Bankruptcy Act, 1883, where there are mutual credits, debts, or dealings between the debtor and a person claiming to prove against his estate, the sum due from one is to be set off against any sum due from the other, and the balance only is to be claimed or paid on either side respectively.

In *Grissell's Case* (1) it was held that a shareholder in, who was also a creditor by contract of, a limited company in course of winding-up, could not set off the debt due to him against the calls made on him in the winding-up. But that case does not apply here, for that case was decided before the Act of 1875 was passed. The shareholder was not a bankrupt, and the calls were not made while the company was a going concern.

But even before the Act of 1875 a bankrupt shareholder's trustees were held entitled to set off a debt due to him from a company against calls made on him in the winding-up; and it is pointed out that *Grissell's Case* (1) does not apply where the contributory is bankrupt, and that under s. 95 of the Companies Act, 1862, the liquidator in such a case is to prove and draw a dividend in the bankruptcy of a contributory for any balance due from the latter: *In re Duckworth*. (2)

In that case the application was in bankruptcy, because the debt due from the contributory was greater than that due from

(1) (1866) L. R. 1 Ch. 528.

(2) (1867) L. R. 2 Ch. 578.



the company; but it was held that the set-off could also be made where the balance was the other way, and the claim was made in the winding-up: *Ex parte Strang*. (1) WRIGHT J.

Sect. 10 of the Act of 1875 applies the rule there laid down to cases in which the contributory is not a bankrupt individual, but an insolvent company in liquidation.

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*Gill's Case* (2) is merely an authority that a solvent contributory cannot set off a debt due to him from the company against calls made in the winding-up, and that the Act of 1875 has not made any difference in this respect. And Bacon V.-C. there says (3): "There is no sort of resemblance between the case of a bankrupt shareholder, as in *In re Duckworth* (4) and *Ex parte Strang* (1), and the present case. In the case of a bankrupt shareholder, when a company or its liquidator went to prove for their call, being at the same time indebted to the bankrupt, part of the bankrupt's estate would consist of the debt which the company owed, and therefore, before the liquidator could share with the other creditors, he must pay the company's debt, or allow it to be set off." If one substitutes the word "liquidating" for "bankruptcy," which s. 10 of the Act of 1875 entitles one to do, the observations of Bacon V.-C. apply to the present case. The Auriferous Company before it can share with the other creditors of the Gold Company must pay the latter's debt or allow a set-off, for a company which takes shares and becomes insolvent is in the same position as a bankrupt contributory. The liquidator of the company may rely on the decision of Jessel M.R. in *In re Whitehouse & Co.* (5) that a solvent contributory could not set off a debt due to him from a company against calls on shares held by him, whether the calls were made before or after a voluntary winding-up. There, again, the contributory was not insolvent, and the Act of 1875 was not referred to. The ground of that decision, that the calls were due to the liquidator and the debt was due, not from him but the company, was disapproved of by Cotton L.J. in *In re Pyle Works*. (6)

(1) (1870) L. R. 5 Ch. 492.

(2) (1879) 12 Ch. D. 755.

(3) 12 Ch. D. 757.

(4) L. R. 2 Ch. 578.

(5) (1878) 9 Ch. D. 595.

(6) (1890) 44 Ch. D. 534, 575.

WRIGHT J. In *Black & Co.'s Case* (1) Lord Selborne L.C. points out that the ordinary law of set-off is, that where there are cross-demands of a nature substantially the same, and due from two persons in the same right—that is, where one is a creditor in his own right and debtor also in his own right to the other—the one debt may be set off against the other.

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That ordinary right of set-off exists in the present case. Both the debt and the calls were due before either company went into liquidation. The two cross-demands were due from the two companies in the same right, for the Auriferous Company's right of action in its own name for the calls was not by the winding-up merged in the right of the liquidator as a distinct persona to proceed by obtaining a balance order: *Westmoreland Green and Blue Slate Co. v. Feilden*. (2) Calls made before the winding-up are by s. 16 of the Companies Act, 1862, in the nature of a specialty debt, and there was therefore a debt due from each company to the other; and on the Gold Company subsequently going into liquidation—in another word, bankruptcy—the right of set-off given by the Bankruptcy Act, 1883, was applied to the case by s. 10 of the Act of 1875.

*Howard Wright*, for the official receiver and liquidator of the Auriferous Company. *In re Duckworth* (3) and *Ex parte Strang* (4) are inconsistent with *Grissell's Case* (5) and *Black & Co.'s Case*. (1) *Grissell's Case* (5) shews that the shareholder cannot set off a debt due from a company against calls on shares held by him in that company. *In re Whitehouse & Co.* (6) points out that there is no difference in this respect between calls made before and calls made after a winding-up has commenced. Although the reasoning of Jessel M.R. was not approved of in *In re Pyle Works* (7), Cotton L.J. in that case says that the decision of the Master of the Rolls was right, but that the true ground is that which was put by the Court of Appeal in *Black & Co.'s Case*. (1) There Lord Selborne says (8): "The moment that the winding-up takes place, the whole administration is

(1) (1872) L. R. 8 Ch. 254, 261.

(2) [1891] 3 Ch. 15.

(3) L. R. 2 Ch. 578.

(4) L. R. 5 Ch. 492.

(5) L. R. 1 Ch. 528.

(6) 9 Ch. D. 595.

(7) 44 Ch. D. 534, 575.

(8) L. R. 8 Ch. 254, 262.

carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu*. The different sections of the Act of 1862 "all have in view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear on the subject." One of the sections of the Act of 1862 which he referred to is s. 38, which is the statutory authority under which the unpaid part of a share is collected on the occurrence of a winding-up. Another section referred to is s. 101, which refers to calls made, as in this case, before winding up, and expressly negatives the right of set-off in respect of such calls in the case of a limited company. *Black & Co.'s Case* (1) is recognised as a binding authority in *In re Whitehouse & Co.* (2) and *In re Pyle Works* (3), both of which were decided after s. 10 of the Act of 1875 had come into operation. That section imported into winding-up the rules as to set-off in bankruptcy in the case of ordinary debts due to the company, such as damages for breach of contract: *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (4) But the rule has so far not been applied where a set-off is attempted to be made against calls.

[WRIGHT J. referred to *Ex parte Theys*. (5)]

That was not a case where a set-off against calls was recognised as allowable.

*Northcote*, in reply.

*Cur. adv. vult.*

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(1) L. R. 8 Ch. 254, 261.

(2) 9 Ch. D. 595.

(3) 44 Ch. D. 534, 575.

(4) (1884) 9 App. Cas. 434.

(5) (1884) 25 Ch. D. 587.

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WRIGHT J. May 4. WRIGHT J. Both the Auriferous Company and the Gold Company are now in liquidation. Before the liquidation of either of them the latter company owed the former for calls made and in arrear, and the former owed the latter for money lent. The question is whether against the claim for the amount of the calls the claim for the money lent can be set off. If the Gold Company had not been in liquidation it could not have set off its claim for money lent against its liability for the amount of the call. That was decided before the Judicature Acts in *Grissell's Case* (1) and in *Black & Co.'s Case* (2), with reference to calls made by a liquidator in a winding-up under an order of the Court, or (per Lord Selborne) in a voluntary winding-up. And since the Judicature Act, 1875, it has been held in the case of *In re Whitehouse & Co.* (3) that the same rule holds good whether the call is made before or in the liquidation, and whether the liquidation is compulsory or voluntary. The ground of the rule is that all contributions from shareholders enforceable in the liquidation are by the Companies Acts made applicable for the payment of the company's creditors *pari passu* (ss. 38, 101, 133 of the Companies Act, 1862), and that a person who is a creditor and also a contributory cannot be allowed to do what might amount to paying his own claim in full out of a fund which ought to be distributed rateably (see *Black & Co.'s Case* (2) and *In re Pyle Works* (4), where the decision in *In re Whitehouse & Co.* (3) is approved, though some of the reasons given by Jessel M.R. in that case are questioned). Whether the same rule would apply if the liquidator sought to enforce the call by action seems not to have been the subject of express decision; but the call, though made and payable before the liquidation, and therefore at one time a debt due to the company, is also enforceable by the liquidator by balance order as a contribution to be made in the winding-up for *pari passu* distribution, and in this aspect is not a subject of set-off in the case of a limited company. But in the present case it happens that the Gold Company is also in

(1) L. R. 1 Ch. 528.

(2) L. R. 8 Ch. 254.

(3) 9 Ch. D. 595.

(4) 44 Ch. D. 534, 537, 585.

liquidation, and the question is, What is the effect of this? If the Gold Company had been a bankrupt individual instead of being a company in liquidation, the liquidator of the Auriferous Company must have enforced his claim in the bankruptcy and according to bankruptcy law, which even before and apart from the Judicature Act would have allowed the set-off: *In re Duckworth* (1), where the question arose in the bankruptcy of the creditor-contributory; *Ex parte Strang* (2), where it arose in the liquidation of a company. Here the creditor-contributory is not a bankrupt individual, but is a company in liquidation, and, therefore, the particular ground on which *In re Duckworth* (1) was decided is not applicable. The liquidator of the Auriferous Company is not driven to proceed in the bankruptcy or to submit to the rules of the Bankruptcy Court, but proceeds in the Chancery Division, and is entitled to the benefit of the Companies Acts as there administered. And the simple question is whether s. 10 of the Judicature Act, 1875, has introduced into the law of the winding-up of companies the bankruptcy rules as to set-off, so as to allow a set-off against liability for the amount of unpaid calls in the case of a company constituted with limited liability. It seems to me that this question is decided in effect in the negative by *Gill's Case* (3), which was cited with approval in the Court of Appeal in *In re Washington Diamond Mining Co.* (4); and that the liquidator of the Auriferous Company is entitled to prove in the winding-up of the Gold Company for the whole amount still due upon the shares, leaving the liquidator of the Gold Company to his right of proof in the winding-up of the Auriferous Company for the money lent. It is true that in *Gill's Case* (3) the creditor-contributory was not a company in liquidation, but that circumstance does not prevent it from being in point as a decision that the bankruptcy law of set-off is not imported by the Judicature Act into the law of companies so as to allow a set-off against calls; though for other purposes there may be the same right as in bankruptcy (see in *Ex parte Theys* (5)) to a set-off of cross-

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(1) L. R. 2 Ch. 578.

(3) 12 Ch. D. 755.

(2) L. R. 5 Ch. 492.

(4) [1893] 3 Ch. 95.

(5) 25 Ch. D. 587.



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WRIGHT J. claims as existing at the time of the bankruptcy. *In re Duckworth* (1) has, therefore, no application. The view which I have taken seems to be consistent with all the decisions on s. 101 of the Act of 1862 since the Judicature Act (see e.g., *Ex parte Pelly* (2) and *In re Pyle Works* (3), per Lindley L.J.).

The application, therefore, fails as regards the claim to a right of set-off, and I must declare that the liquidator of the Gold Company has not such a right, but only a right of proof.

It may be difficult to see how the ground of the decision in *In re Duckworth* (1) is to be reconciled with the law of companies as stated by Lord Selborne in *Black & Co.'s Case* (4), where he says that the liquidator who "receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors." But the decision in *In re Duckworth* (1) has stood so long that I do not suppose that the House of Lords, even if they differed from it, would now interfere with it.

Solicitor for the liquidator of the Gold Company: *W. H. Hudson.*

Solicitors for the official receiver and liquidator of the Auriferous Company: *Freshfields & Williams.*

(1) L. R. 2 Ch. 578.

(2) (1882) 21 Ch. D. 492, 509.

(3) 44 Ch. D. 585.

(4) L. R. 8 Ch. 254, 262.

*In re* WAVERLEY TYPE WRITER.  
D'ESTERRE *v.* WAVERLEY TYPE WRITER.

[1897 W. 1598.]

WRIGHT J.

1898

April 28.

*Company—Debenture—Floating Charge—Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19).*

The Preferential Payments in Bankruptcy Amendment Act, 1897, received the Royal assent on July 15, 1897. Before that date a winding-up order had been made against a company which had issued debentures creating a floating charge, and a receiver had been appointed in an action for realization of the debentures :—

*Held*, that the Act was not retrospective, and did not apply so as to give priority over the debenture-holders to the preferential creditors referred to in the Act.

THE Waverley Type Writer, Limited, issued debentures for 10,000*l.*, each being for 50*l.* and charged upon its undertaking and all its property whatsoever and wheresoever, including its uncalled capital for the time being, but with the exception of its French patents. The principal moneys secured were payable on November 30, 1895, and also became immediately payable if the company should make default for three calendar months in payment of interest, or a winding-up order should be made or a winding-up resolution passed.

The company stopped business early in 1897, and on May 18, 1897, H. V. D'Esterre, on behalf of himself and the other debenture-holders, issued a writ against the company in an action to realize the security created by the debentures.

On May 19, 1897, a petition for the winding up of the company was presented. On May 21, 1897, a receiver was appointed in the action, and on June 2, 1897, a winding-up order was made on the petition.

The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), received the Royal assent on July 15, 1897, and the plaintiff took out a summons in the action for directions as to whether the receiver ought to make the preferential payments mentioned in the Act.

WRIGHT J. *C. T. Mitchell*, for the plaintiff. The Preferential Payments in Bankruptcy Amendment Act, 1897, is not retrospective in its operation. It received the Royal assent on July 15, 1897, but does not state in terms whether the priority given by it is to affect debentures creating a floating charge where the winding-up of the company has commenced or the appointment of a receiver in a debenture-holders' action has been made before that date. Here both the winding-up and the appointment were before the Act received the Royal assent. "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. Nova constitutio futuris formam imponere debet, non præteritis. They are construed as operating only on cases or facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended": Maxwell on Interpretation of Statutes, 2nd ed. p. 257.

[WRIGHT J. Hardcastle on the Construction and Effect of Statute Law is a very good text-book on the subject.]

The Act of 1897 gives priority to the "debts mentioned in section one of the Preferential Payments in Bankruptcy Act, 1888," and apparently intends to incorporate the provisions of that Act in the cases where the company has created a floating charge on its assets. By s. 3 of the Act of 1888, that Act is only to apply in the case of "windings-up commenced after the commencement of this Act," and it is contended that the Act of 1897 has application only to the same extent. By the appointment of the receiver the charge ceased to be a floating one.

It has just been pointed out to me that in *In re Joseph Suche & Co.* (1) Jessel M.R. held that s. 10 of the Judicature Act, 1875, was not retrospective, and did not apply to the case of a winding-up commenced before the commencement of that Act.

[He also referred to *Reg. v. Griffiths* (2); *Bourke v. Nutt* (3); *Thistleton v. Frewer* (4); Maxwell on Interpretation of Statutes, 2nd ed. pp. 270, 271.]

(1) (1875) 1 Ch. D. 48.

(2) [1891] 2 Q. B. 145.

(3) [1894] 1 Q. B. 725.

(4) (1861) 31 L. J. (Ex.) 230.

*Percy F. Wheeler*, for the official receiver and liquidator of the defendant company. The Act of 1897 is retrospective. The Act of 1888 repealed and was substituted for the Companies Act, 1883 (46 & 47 Vict. c. 28), which was silent as to the date of its application, but was held to be retrospective: *In re Anglo-French Co-operative Society*. (1)

The Act of 1888 was passed in altered terms in consequence of that decision. The plaintiff might with equal force contend that debentures creating a floating charge which were issued before July 15, 1897, were not within the Act of 1897.

*Mitchell*, in reply.

WRIGHT J. This case is very much on the line, but on the whole I think the Act of 1897 is not retrospective. The reasons for my opinion are two. *Primâ facie* an Act affecting the existing rights of persons in the way in which this statute affects people's rights is not retrospective. The terms of s. 2 are ambiguous, for it simply says that certain debts are to have priority "in the winding-up of any company" under the Companies Acts. Having regard to the terms of s. 3, *primâ facie* that provision is prospective only.

The observations of the Earl of Selborne in delivering the judgment in *Main v. Stark* (2) support the contention that the Act is not retrospective. His Lordships says (referring to another statute): "The sixth schedule, when looked at, is on the face of it prospective. Their Lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language, which might give to words *primâ facie* prospective a larger operation; but they ought not to receive a larger operation unless you find some reason for giving it. . . . It"—the 61st clause—"was not meant to take away vested rights and interests as they existed at the time of the Act. To give such a schedule, referred to in such a clause, that operation, would in the first place be contrary to general principles. Even if there were not on the face of the Act something affirming those principles, words not requiring a retrospective operation, so as to affect an

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(1) (1884) 50 L. T. 754.

(2) (1890) 15 App. Cas. 384, 387.

WRIGHT J. existing status prejudicially, ought not to be so construed.”  
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And *In re Joseph Suche & Co.* (1) is a strong case in support of the same view. In the case last mentioned Jessel M.R. went out of his way to decide as he did. He said in his judgment: “Since this question came last before me I have consulted several of the other judges,” and, referring to s. 10 of the Judicature Act, 1875, he said: “I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding-up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation.” In the present case the Legislature has interfered with the rights of debenture-holders if they have not taken steps to realize their securities before the passing of the Act; but it has not gone so far as to interfere with their rights when they have already taken those steps. The Act of 1897 seems to form part of or to be incorporated with the Act of 1888, which in terms only applies where a winding-up has commenced after the commencement of the Act. The decision in *In re Anglo-French Co-operative Society* (2) turned on the particular language of a different statute. Kay J. says in his judgment: “The 3rd section of the Companies Act, 1883 provides that the Act shall come into force on the 1st of September, 1883. The 4th section provides that, ‘In the distribution of the assets of any company being wound up under the Companies Acts, 1862

(1) 1 Ch. D. 48.

(2) 50 L. T. 754.



and 1867,' certain preferential payments shall be made. I WRIGHT J. must give those words their literal meaning. Surely 'being wound up' must mean being wound up at or after the commencement of the Act." No such words occur in the Act of 1897, and in this case I must hold that the claim to priority over the floating charge fails.

Solicitors for plaintiff: *John H. Mote & Son.*

Solicitors for official receiver: *Shaen, Roscoe, Massey & Co.*

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## COGHLAN v. CUMBERLAND.

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[1896 C. 3518.]

April 30;  
May 2, 3, 13.

*Appeal from Judge without Jury—Appeal raising Questions of Fact.*

Observations as to the rules which should be applied by the Court on the hearing of such appeals.

THIS was an action to set aside an agreement for the purchase of a business, and for the recovery of 1000*l.* paid by the plaintiff as part of the purchase-money, and also for the delivery up of a mortgage given by the plaintiff to secure the further sum of 1000*l.*, the remainder of the purchase-money.

The action was brought upon the ground that the plaintiff was induced to buy the business by misrepresentation on the part of the defendants.

The case was heard before Gorell Barnes J., who came to the conclusion that the plaintiff had failed to prove that the representations made to him were untrue, and gave judgment for the defendants.

The plaintiff appealed from that decision, and in the course of the considered judgment of the Court (Lindley M.R., Rigby and Collins L.JJ.), which was delivered by LINDLEY M.R., his Lordship made the following observations:—

This action is brought on the ground that the plaintiff was induced to buy the business by misrepresentation. The action is for rescission of contract, and not for damages for a fraudulent misrepresentation. Although the plaintiff claims a return of the 1000*l.* paid, he does not expect to get it back, and his real object is to be relieved from the payment of another 1000*l.* under the covenant in the mortgage. Gorell Barnes J. has given judgment for the defendants on the ground that the plaintiff failed to prove that the representations made to him were untrue, and we have to consider whether this decision is right.

The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to

bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen. With these preliminary observations we pass to the facts of the present case.

[His Lordship then dealt with the merits of the case (which do not require a report), and after going through the evidence came to the conclusion that the appeal ought to be allowed and the judgment appealed from reversed, with costs.]

*H. Terrell, Q.C., and Waggett, for the appellants.*

*Vernon Smith, Q.C., and Cecil M. Chapman, for some of the defendants.*

*W. G. Clay, for the remaining defendant.*

Solicitors: *Guscotte, Wadham & Bradbury; A. W. Bartlett.*

W. W. K.

END OF VOL. I.



The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1898 will be as follows :—

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- The defendants in 1891 entered into a contract with M. to pay him monthly one cent in Mexican currency per cubic metre of certain excavation works being done in Mexico, as and when payment should be received by defendants from the Mexican authorities; and during M.'s life they duly paid him. M. died in June, 1894; but he had no legal personal representative till May, 1896, when the plaintiff became his administrator.
- In an action for account brought by the plaintiff in June, 1896, the Court, on November 4, 1897, declared that he was entitled to an account of what was due under the contract, and on November 13 the defendants delivered an account shewing that 19,366 Mexican dollars were due to the plaintiff on August 31, 1896, and offering to pay that amount in Mexican currency or in English currency at the rate of exchange on November 13. On August 31, 1896, the Mexican dollar was worth 2s. 6d., on November 13, 1897, it was only worth 1s. 10½d.; and the plaintiff refused the defendants' offer, and contended that the value of the dollar should be ascertained at the several times the monthly payments become due, or, in the alternative, on August 31, 1896 :—
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**CHARITY**—“Ecclesiastical Charity”—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 70, 75.

The founder of an eleemosynary charity prescribed by the instrument of foundation that the objects should be selected from among persons who should have (1.) regularly attended divine service at the parish church for a fixed period, (2.) been partakers of the Holy Communion, (3.) lived a godly, righteous and sober life to the glory of God's Holy Name, and that the trustees should be members of the Church of England:—

Held, that this was a charity the endowment whereof was held for the benefit of members of the Church of England as such, and was therefore an ecclesiastical charity within s. 75 of the Local Government Act, 1894. *In re PERRY ALMSHOUSES* - - - Stirling J. 391

2. — Jurisdiction of Charity Commissioners—Exemption from—“Any Cathedral, Collegiate, Chapter, or other Schools”—*Ejusdem generis* Rule—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66.

The proviso at the end of s. 62 of the Charitable Trusts Act, 1853, excluding from the exemption contained in that section “any cathedral, collegiate, chapter, or other schools,” does not extend to all schools of whatever description,

**CHARITY**—*continued*.

but only to the schools mentioned and others of a similar kind. *In re STOCKPORT RAGGED, INDUSTRIAL AND REFORMATORY SCHOOLS*

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**COMPANY**—*Debenture—Agreement to give Debenture when called upon—Waiver—Equitable Security—Debenture-holder's Action.*

In 1882 a company borrowed money from P., for which they gave him a promissory note bearing interest at 5 per cent., and undertook that they would at any time, when called upon by the holder of the note, issue for the amount debentures, bearing interest at  $4\frac{1}{2}$  per cent., of a series which constituted a second charge on the company's assets, subject to a charge in favour of a first series of debentures previously issued. In 1894 an action was brought by debenture-holders against the company to enforce their security. P. was one of the plaintiffs, as a holder of a first debenture, the other plaintiff being a holder of a second debenture. P. did not then claim to be a holder of a second debenture. He had continued to receive interest at 5 per cent. on his promissory note, and had not applied to the company for debentures for the amount. After judgment in the action P. for the first time claimed to have debentures of the second series issued to him for the amount of his debt. The whole of the second series had not been issued, and the amount remaining unissued was sufficient to answer P.'s claim:—

*Held*, that P. had not waived his right under his agreement with the company; that he was in equity a holder of debentures of the second series for the amount of his debt; and that he was entitled in respect of that amount to share in the distribution of the company's assets as if he were a legal holder of debentures of the second series.

*In re Queensland Land and Coal Co.*, [1894] 3 Ch. 181 followed. *PEGGE v. NEATH AND DISTRICT TRAMWAYS COMPANY* - North J. 183

2. — *Debenture—Floating Charge—Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 Vict. c. 19).

The Preferential Payments in Bankruptcy Amendment Act, 1897, received the Royal assent on July 15, 1897. Before that date a winding-up order had been made against a company which

**COMPANY**—*continued*.

had issued debentures creating a floating charge, and a receiver had been appointed in an action for realization of the debentures:—

*Held*, that the Act was not retrospective, and did not apply so as to give priority over the debenture-holders to the preferential creditors referred to in the Act. *In re WAVERLEY TYPE WRITER. D'ESTERRE v. WAVERLEY TYPE WRITER* Wright J. 699

3. — *Debenture—Floating Security—Equitable Incumbrancers—Priority—Negligence—Possession of Title Deeds.*

In 1885 a limited company issued a series of debentures charged upon all its property both present and future, such charge to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debentures. In 1895 the company deposited the title deeds of some of its property with its bankers, on a memorandum of charge under seal, as a security for an overdraft. When this charge was given, the bank had no notice of the existence of the debentures and made no inquiries. In 1896 a debenture-holders' action to enforce the security was commenced in which an inquiry as to priorities was directed:—

*Held*, that the debenture-holders, having left the title deeds with the company so as to enable it to deal with its property as if it had not been incumbered, could not set up their prior charge against the equitable mortgage to the bank; that the bank had not been guilty of negligence, and, having a stronger equity than the debenture-holders, was entitled to priority. *In re CASTELL & BROWN, LIMITED. ROPER v. CASTELL & BROWN, LIMITED* - - - - - Romer J. 315

4. — *Debenture—Receiver—Power to Debenture-holder to appoint—Fiduciary Power—Jurisdiction of Court.*

A company issued a series of debentures, each of which contained a condition that, at any time after the principal moneys thereby secured should have become payable, the L. Corporation (one of the debenture-holders) might by writing appoint a receiver of all or any part of the property thereby charged. In exercise of this power the corporation, who were also shareholders in the company, appointed a receiver:—

*Held*, that the corporation were trustees of this power on behalf of all the debenture-holders, and were bound to exercise it in their interest alone, and that as it was shewn that the appointment had been made in the interest of the shareholders, and not in that of the debenture-holders, the Court had jurisdiction to interfere to carry out the trust, and accordingly to appoint its own receiver.

Decision of North J. affirmed. *In re MASKELYNE BRITISH TYPEWRITER, LIMITED. STUART v. MASKELYNE BRITISH TYPEWRITER, LIMITED* C. A. 133

5. — *Debenture—Redemption—"Redeemable"—Sinking Fund—Prospectus.*

Debentures issued by a company provided that the company should carry to the credit of a sinking fund in each half-year the sum of 2500l.



**COMPANY—continued.**

which should be applied in redeeming at a specified premium, on January 1 and July 1 in each year, so many of the debentures issued as the sum from time to time standing to the credit of the sinking fund should suffice to pay off, the particular debentures to be redeemed on each occasion being determined by half-yearly drawings. The prospectus which the company had previously issued, inviting subscriptions for the debentures, stated that they were to be "redeemable within seventeen years by half-yearly drawings on January 1 and July 1 in each year by the application of a sinking fund of 5000*l.* per annum"—

*Held*, that, even if the prospectus could be looked at in order to ascertain the contract between the company and the debenture-holders, the word "redeemable" meant only that the debentures were to be liable to redemption during the seventeen years, but that there was no obligation upon the company that they should all be redeemed within that period.

*Semble*, however, that the debentures contained the whole contract between the company and the debenture-holders, and that the prospectus could not be looked at for the purpose of interpreting the contract. *In re CHICAGO AND NORTH WEST GRANARIES COMPANY, LIMITED.* MORRISON *v.* SAME COMPANY - - - North J. 263

**6. — Directors—Appointment—Undischarged Bankrupt—Clause validating the Acts of de facto Directors.**

No. 114 of the articles of a company provided that all acts done at any meeting of directors or by any person acting as a director should, notwithstanding that it should be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. T., N., and S., the de facto directors, made a call, payment of which was resisted by some of the shareholders on the ground that T., N., and S. were not de jure directors. To shew that they were not, various irregularities were alleged, the most important of which was that N. had according to the articles vacated his office by parting with all his shares. After six days he acquired other shares sufficient for a qualification, and continued to act as director. His co-directors, who had power to fill up the casual vacancy occasioned by his parting with his shares, did not formally reappoint him, but all along treated him as a director; and it did not appear that they ever knew that for six days he had not been a shareholder:—

*Held*, by the Court of Appeal, that a clause such as art. 114 did not operate only as between the company and outsiders, but also as between the company and its members, and was sufficient to cover such irregularities as those alleged, and that the call was valid.

*Howbeach Canal Co. v. Teague*, (1860) 5 H. & N. 151, considered.

T. was an undischarged bankrupt. One of the articles provided that a director should vacate his office if he became bankrupt:—

**COMPANY—continued.**

*Held*, that this did not prevent the appointment of a bankrupt to be a director.

Decision of Ridley J. reversed. *DAWSON v. AFRICAN CONSOLIDATED LAND AND TRADING COMPANY* - - - C. A. 6

**7. — Name—Similarity of—Deception—Trade Name—Injunction.**

In 1897 two companies existed called the Manchester Brewery Company and the North Cheshire Brewery Company. The former had its brewery in Manchester and had a large business there. The latter had its brewery in Macclesfield and had its business chiefly in Macclesfield, but to some extent also in Manchester. In that year the business of the latter company was sold to persons who started a new company named "The North Cheshire and Manchester Brewery Company":—

*Held* (reversing the decision of Byrne J.), that though it did not appear that there was any fraudulent intention, they must be restrained from trading under that name, as it was calculated to deceive the public into thinking that the new company was carrying on the business of the Manchester Brewery Company.

There is no rule that a name is not so like another as to be calculated to deceive when the words common to the two names come first in the one and last in the other. *MANCHESTER BREWERY COMPANY v. NORTH CHESHIRE AND MANCHESTER BREWERY COMPANY* - - - C. A. 539

**8. — Register of Members—Inspection—Right to take Copies—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32.**

The right to inspect the register of members of a company, which is conferred by s. 32 of the Companies Act, 1862, carries with it the right to take extracts from or to make copies of the entries in the register.

The right (also given by the section) to require a copy of the register on payment is in addition to, and not in substitution for, the above implied right.

The "register" includes the entries of the names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or otherwise. *BOORD v. AFRICAN CONSOLIDATED LAND AND TRADING COMPANY* - - - North J. 596

**9. — Shares—Issue of, as fully paid—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Registered Contract—Sufficiency—Statement of Consideration—Property purchased described merely by Reference—Rectification of Register—Form of Order.**

Where the contract registered under s. 25 of the Companies Act, 1867, on the issue of fully paid shares as part of the consideration for the sale of property to a company, sufficiently described the vendor and the company, and the amount and mode of payment of the purchase-money, but described the property sold merely by reference to the schedule to a previous contract:—

*Held*, on the authority of *In re Kharashkhona Exploring and Prospecting Syndicate*, [1897] 2 Ch. 451, that the consideration for the issue of the shares was insufficiently stated, and that an



**COMPANY—continued.**

order ought to be made for the rectification of the register of shareholders.

The order for rectification in such a case ought simply to direct that the name of the shareholder should be struck off the register, and ought not to direct the registration of another contract and subsequent registration of the name: *See* Chadwyck Healey on Companies, 3rd ed. p. 384. *In re* MAYNARDS, LIMITED

Kekewich J. 515

10. — *Ultra vires—Sale of Undertaking—Compensation to Directors—Notice of Extraordinary Meeting—Sufficiency of Notice—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 71, 85, 86, 99.*

By a provisional agreement made between two companies for the sale of the undertaking of the one to the other, the purchasing company agreed to pay, in addition to the sum payable to the selling company, a substantial sum to the directors of the selling company as compensation for loss of office, and the agreement was made conditional upon its adoption by the shareholders of the selling company. The notice convening the meeting of shareholders to consider the agreement described it simply as an agreement for the sale of the undertaking. The selling company was governed by the Companies Clauses Act, 1845:—

*Held*, (1.) that the provision in favour of the directors did not render the agreement *ultra vires*, but (2.) that the notice, by reason of its omission to refer to this provision, did not fairly disclose the purpose for which the meeting was convened, and did not comply with s. 71 of the Companies Clauses Act.

*Southall v. British Mutual Life Assurance Society*, (1871) L. R. 6 Ch. 614, followed.

*Hutton v. West Cork Ry. Co.*, (1883) 23 Ch. D. 654, distinguished.

*Per* Vaughan Williams L.J.: *Semble*, if the money payable under this agreement to the directors was a bonus to them in consideration of their facilitating the contract, the agreement would not be binding upon a dissentient shareholder. *Kaye v. Croydon Tramways Company*

C. A. 358

11. — *Winding-up—Contributory—Alleged Contract of Membership—Error of Subscriber as to Identity of Company.*

Shortly before November, 1895, B. took steps with a view to becoming a Fellow of an old-established society called "The Auctioneers' Institute of the United Kingdom." In November, 1895, X., an officer of a recently incorporated society (with unlimited liability) named "The Institute of Auctioneers and Valuers," called on B. and asked him to become a member of it. B. believed the new society to be the old one, and in this belief, which was known to and fostered by X., B. applied for membership in the new society, and received a certificate of membership. In answer to his subsequent inquiries of the new society, untruthful statements were made to B. which resulted in his remaining in his error as to the identity of the society:—

*Held*, that the principle of *Cundy v. Lindsay*, (1878) 3 App. Cas. 459, applied; that there was

**COMPANY—continued.**

not even a voidable contract to become a member, but no contract at all; and that B. was entitled to have his name removed from the list of contributories in the winding-up of the new society, although he had not before the winding-up commenced taken any step to have it declared that he was under no liability. *In re* INTERNATIONAL SOCIETY OF AUCTIONEERS AND VALUERS. *Baillie's Case* - - - Wright J. 110

12. — *Winding-up—Contributory—Election to avoid Contract to take Shares—Effect of opposing Winding-up Petition as Contributory—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35—Companies Winding-up Rules, April, 1892, Rule 20, Form 2.*

Where a person to whom shares in a company have been allotted has commenced proceedings, before the filing of a winding-up petition against the company, to obtain rescission of the contract (if any) to take the shares, the election thus made by him to avoid the contract is not departed from by his subsequently opposing the petition in the character of a contributory. *In re* THOMAS EDWARD BRINSMEAD & SONS. *Tomlin's Case*

Wright J. 104

13. — *Winding-up—Contributory—Petition, Right to—Limitation by Articles of Association—Validity—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82.*

The right given by s. 82 of the Companies Act, 1862, to a contributory to petition for the winding-up of the company cannot be excluded or limited by the articles of association of the company.

Decision of Byrne J. affirmed. *In re* PEVERIL GOLD MINES, LIMITED - - - C. A. 122

14. — *Winding-up—Creditor-Contributory—Insolvent Company holding Shares—Set-off of Debt against Calls—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 16, 38, 101—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.*

The G. Company, Limited, held shares in the A. Company, Limited, and before either company went into liquidation calls were made on the shares, and the A. Company became indebted to the G. Company for money lent.

The A. Company was ordered to be wound up by the Court, and the G. Company, being insolvent, passed an extraordinary resolution for voluntary winding-up:—

*Held*, that s. 10 of the Judicature Act, 1875, did not enable the liquidator of the G. Company to set off the debt against the calls. *In re* AURIFEROUS PROPERTIES - Wright J. 691

15. — *Winding-up—Defunct Company—Advertisement of Petition—Service of Petition—Companies Act, 1880 (43 & 44 Vict. c. 19), s. 7—Companies Winding-up Rules, 1890, r. 35.*

Where the Registrar of Joint Stock Companies has struck the name of a defunct company off the register under s. 7 of the Companies Act, 1880, the proper remedy of a creditor is to petition for a winding-up order. In such a case neither the provisions as to service of the petition contained in the rules of 1890, nor the provisions as to service contained in the Act of 1880, apply,

**COMPANY—continued.**

but special directions as to service must be obtained. *In re* ANGLO-AMERICAN EXPLORATION AND DEVELOPMENT COMPANY

Vaughan Williams L.J. 100

16. — *Winding-up—Directors' Fees—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 38, sub-s. 7.

The articles of association of a company required its directors to possess a share qualification; and provided that the remuneration of the board "shall be an annual sum of 1000*l.* to be paid out of the funds of the company":—

*Held*, that although these provisions in the articles were only part of the contract between the shareholders inter se, the provisions were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors; that the remuneration was not due to the directors in their character of members, but under the contract so embodying the provisions; and that, in the winding-up of the company, the directors were entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding-up.

*Ex parte Cannon*, (1885) 30 Ch. D. 629, distinguished. *In re* NEW BRITISH IRON COMPANY.

*Ex parte* BECKWITH - - - Wright J. 324

17. — *Winding-up—Liquidator—Companies Liquidation Account—"Undistributed Assets"—Companies (Winding-up) Act, 1890* (53 & 54 Vict. c. 63), s. 15, sub-s. 3—*Companies Winding-up Rules, 1890*, r. 127*d.*

In December, 1895, a limited company, being unable to pay the interest on its debentures, went into voluntary liquidation. On April 15, 1896, the Court sanctioned a scheme under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), which provided that the uncalled capital of the company should be called up by the voluntary liquidators, and that they should thereout, by September, 1897, pay sums amounting to a dividend of 12*s.* 6*d.* in the pound to the debenture-holders, the balance being payable in 1902, and the interest being kept down in the meantime. Any surplus from calls, after payment of the first dividend, might be applied, according to the liquidators' discretion, for management and other expenses. The scheme also gave the liquidators power to borrow for the purpose of protecting and developing the assets. On the debenture-holders being paid off the winding-up was to be stayed, and the company was to resume business. By a trust deed executed in pursuance of the scheme the liquidators covenanted to apply the proceeds of the call in accordance with the scheme. In May and September, 1897, the liquidators filed with the Registrar of Joint Stock Companies the statements of account required by s. 15 of the Companies (Winding-up) Act, 1890, but they refused to pay into the Companies Liquidation Account the surplus of calls shewn by the accounts to be still in their hands or under their control, although directed to do so by the Board of Trade. On a motion by the Board for an order to comply with its direction:—

*Held*, that the money was not "undistributed

**COMPANY—continued.**

assets" within s. 15, sub-s. 3, of the Act of 1890, and that the liquidators could not be called on to pay it into the Companies Liquidation Account. *In re* LAND MORTGAGE BANK OF FLORIDA

Wright J. 444

18. — *Winding-up—Surplus Assets—Articles of Association.*

The articles of association of a company with a nominal capital divided into 1*l.* shares provided that if on the winding-up of the company the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that as nearly as might be the losses should be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls. Shortly after incorporation 100,000 shares were issued on each of which the sum of 5*s.* was paid up, and 25,000 further shares each of which was at once fully paid up. No calls were ever made. In the winding-up of the company, after paying debts and expenses there remained assets sufficient to repay the holders of the 25,000 shares 15*s.* per share, but insufficient to repay all the paid-up capital on the 125,000 shares:—

*Held*, that a call (actual or in account) of 3*s.* per share must be made on the holders of the 100,000 shares, so as to make these shares paid up to the extent of 8*s.* per share; that the amount so called must be applied in repayment of 12*s.* per share to the holders of the 25,000 shares, making their shares also paid up to the extent of 8*s.* per share, and that the assets in hand would then be divisible among the holders of the whole of the 125,000 shares pro rata.

*Ex parte Maude*, (1870) L. R. 6 Ch. 51, and *Birch v. Cropper*, (1889) 14 App. Cas. 525, distinguished. *In re* ANGLO-CONTINENTAL CORPORATION OF WESTERN AUSTRALIA Wright J. 327

19. — *Winding-up—Surplus Assets of Unlimited Company—Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 109, 133.

Sects. 109 and 133 of the Companies Act, 1862, do not supply a rule for the mode of adjusting loss of capital or of distributing surplus assets, but only supply the necessary powers for giving effect to the rights and interests of the parties. In ascertaining those rights in the case of companies constituted under the Companies Acts, in the absence of any provision in the memorandum or articles of association, the capital account must first be equalized, and the balance must be appropriated according to the nominal amount of the shares, and a clause in the memorandum or articles regulating the distribution of dividends will not of itself govern the distribution of surplus.

In the case of companies not constituted under the Acts effect must be given to any clause, in the deed under which the company was constituted, with regard to surplus assets, but a provision as to distribution of dividends does not of itself govern the distribution of surplus.

*Somes v. Currie*, (1855) 1 K. & J. 605, and *Sheppard v. Seinde, Punjab and Delhi Ry. Co.*,

**COMPANY**—*continued.*

(1887) 36 W. R. 1, distinguished and commented on.

By the deed of settlement under which a company was originally constituted losses were to be made good by the shareholders "in proportion to their respective shares," profits were to be divided amongst them "according to the amount of their respective shares," and upon a winding-up the residue, after paying debts, was to be "divided between the several proprietors"—namely, shareholders—"for the time being in proportion to their respective shares." The shares were of 10*l.* each. Some were fully paid, others were only paid up to the extent of 6*l.* 10*s.* per share, and some of both classes had been issued at a premium. The company was afterwards registered under Part VII. of the Companies Act, 1862, as an unlimited company. It sold its undertaking and went into voluntary liquidation, and after payment of its debts and the costs of liquidation had a surplus more than sufficient to return all the paid-up capital:—

*Held*, that the surplus must first be applied in returning the paid-up capital, and that the balance must be distributed amongst all the shareholders in proportion to the nominal amounts of their shares, and without regard to the premiums paid by any shareholders, or the manner in which dividends were payable or had in fact been paid. *In re DRIFFIELD GAS LIGHT COMPANY* - - - - Wright J. 451

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**COPYRIGHT**—Book—Piracy—Infringement—Action on the Case—Detinue—Trove—Combining Causes of Action—Limitation of Actions—Damages—Proceeds of Conversion—Profits—Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 15, 23, 26—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

A proprietor of copyright in a book who has a remedy for infringement by "a special action on the case" under s. 15 of the Copyright Act, 1842, is not precluded from suing the offender, if he thinks fit, under s. 23, either in detinue or in trover, or, if necessary, in both combined; and all the remedies under both sections may be pursued by action in the Chancery Division.

In an action for infringement by a proprietor of copyright in a book, where the defendant had still in his possession some of the infringing copies and had sold others but without making any profits on the sales:—

*Held*, that the plaintiff was entitled, in addition to the usual injunction, to delivery-up of the copies in the defendant's possession and to damages representing the actual amount of the proceeds of the copies sold. *MUDDOCK v. BLACKWOOD*  
Kekewich J. 58

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**COVENANT**—"Private Residence"—School—Boarding and Lodging Scholars attending School.

A covenant not to use a house "for any trade or manufacture, or for any other purpose than a private residence," is broken by using it as a boarding-house for scholars attending a school in the neighbourhood kept by the owner of the house in question.

Such user practically converts the house from a "private residence" to the business of a boarding-house. *HOBSON v. TULLOCH* Romer J. 424

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**DEPOSIT**—Lien for—Specific performance—Delay - - - - - 478  
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**DESIGN**—*Registration—Applicable for Pattern—Coffin-plates—Drawing furnished to Comptroller—“New or Original”—Novel Combination of old Designs—Marking Goods—Statutory Requirements—“All proper Steps”—Motion to Expunge—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 47, 51, 60—Designs Rules, 1890, rr. 8, 9.*

It is not necessary for a person who registers a design under Part III. of the Patents, Designs, and Trade Marks Act, 1883, to describe on his application by means of cross sections or otherwise how the article, for the pattern of which the design is applicable, is to be carried out in manufacture, and it is immaterial whether or not the design can be so carried out in more ways than one.

Although the word “ornament,” which is used in s. 60 of the Act of 1883, is not used in rule 9 of the Designs Rules, 1890, “pattern” in that rule must for the purposes of that rule be taken to include it.

Under the Patents, Designs, and Trade Marks Act, 1883, Part III., R., in May, 1894, registered a design for metallic coffin-plates. Upon his application, he furnished to the comptroller, under rule 8 of the Designs Rules, 1890, a drawing of his design, and stated, under rule 9, that the design was applicable for “patterns.”

The drawing shewed a set of irregular four-sided coffin-plates, with leaf-shaped projections at the corners, each of which contained a shell-pattern ornamentation with double lines or rims running round the inner edges of the plate and enclosing the centre of it, and also double lines enclosing the shells; and in the view taken by the Court of Appeal the drawing indicated that the plate had a sunk centre. S. had previously registered a design of a somewhat similar character, with shells at the corners, but without the inner double lines or rims enclosing the centre and the shells; and in the view taken by the Court of Appeal his drawing indicated a flat centre. R. contended that although parts of his design might be old, the combination of the old parts with the sunken centre and raised rims was new and original.

Upon a motion to remove R.’s design from the

**DESIGN**—*continued.*

register for want of novelty, and for omission properly to mark his goods, it was held by the Court of Appeal—(1) reversing the decision of Kekewich J., that the word “patterns” in the application must be taken to include shape, ornamentation, and outline; and that, having regard to the purpose for which the pattern was designed, there was sufficient indication in R.’s drawing of a sunk centre or raised edges to his coffin-plate to make his design novel and original, and to entitle it to remain on the register; and (2), affirming the decision of Kekewich J., that R. had taken all proper steps to ensure the marking of his goods.

*Per Vaughan Williams L.J.*: The Act of 1883 draws such a distinction between “pattern” and “shape” that when an applicant in applying for the registration of a design chooses to base his application upon “pattern,” then, in dealing with the question of originality or novelty, the right to registration should be limited to matters falling within the meaning of the word “pattern” as used in the application. If the design furnished on an application is limited to “pattern,” novelty or originality cannot be found in anything which is “shape,” as distinguished from pattern; and vice versa. And if the result of the registered design is to leave in ambiguity whether a particular matter is included in it or not, the inclination of the Court ought to be against the applicant, whose duty it is to make clear what the design is which he desires to appropriate to the exclusion of the public.

*Le May v. Welch*, (1884) 28 Ch. D. 24, approved. *In re ROLLASON’S REGISTERED DESIGN*

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- EXECUTOR**—Wilful Default—Breach of Duty—Omission to enable Secured Creditor to realize his Security—Loss of Interest—Action by Residuary Legatee—Will—Neglect to take out Probate.

The executors appointed by a testator did not prove the will until nearly seven years after his death. Part of the testator's estate consisted of moneys payable under a policy of insurance on the life of the testator, which he had equitably

**EXECUTOR—continued.**

mortgaged to his bankers as security for a larger amount. The insurance society would not pay over the moneys without production of the probate, and for nearly seven years the executors paid the bankers or their transferee out of the estate interest at 5 per cent. on their debt.

After production of the probate the insurance company paid over the policy moneys to the bankers' transferee, together with interest at 1 per cent. per annum from the time when such moneys became payable; and the difference between the interest thus received and paid was 157l. 14s. 8d.

The executors never had sufficient assets in their hands to pay all the testator's debts; and it was

*Held*, that the executors could not be ordered to account on the footing of wilful default or breach of duty by reason of this loss of interest to the estate.

*Per Chitty L.J.*: On taking the common accounts of their receipts, executors can properly be, and often are, charged with a devastavit arising on the accounts themselves.

*Per Vaughan Williams L.J.*: No action would lie for neglect to take out probate, and the plaintiff's only remedy would be by citing the executor in the Probate Division.

The decision of North J., [1897] 1 Ch. 422, affirmed. *In re STEPHENS. COOKE v. STEVENS*  
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- Solicitor-executor—Profit costs—Power to charge—Insolvent estate - - - 297  
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- EXONERATION**—Separate estate—Restraint on anticipation—Payment of husband's debts - - - 470  
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**FRENCH LAW**—Domicil—After-acquired property—Community of goods - 403  
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of servants of the Crown - - - 73  
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**HIGHWAY**—Soil of—Street in town—Right of  
adjoining owner—Ad medium filum viæ  
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**HUSBAND AND WIFE** — Probate — Married  
Woman — Will — Invalid Bequest — Grant of  
General Probate to Husband—Implied Assent to  
Will—Probate Rules (Non-contentious Business),  
1887, April 19, rr. 15, 18.

Since the coming into operation of the amended rules 15 and 18 of the Probate Rules (Non-contentious Business), which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.

*Ex parte Fane*, (1848) 16 Sim. 406, has no longer any operation. *In re ATKINSON. WAILER v. ATKINSON* - - - *Stirling J.* 637

2. — Protection Order—Married Woman—  
Feme Sole—Property—Contract—Debts and Liabilities—Assets—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 25, 26—*Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), s. 4.

A married woman, while under a protection order obtained by her under s. 21 of the Matrimonial Causes Act, 1857, is in the position of a feme sole as regards all property coming to her after the date of the order (s. 25), and also for all purposes of contract (s. 26): so that her execution by will since the Married Women's Property Act, 1882, of a general power of appointment created subsequently to the date of the protection order makes the property appointed liable, under s. 4 of the latter Act, for debts or liabilities incurred by her while under the order, even though they may have been incurred before that Act, s. 4 extending to an appointment since the Act by a married woman who had debts and liabilities existing at the date the Act came into operation.

Decision of Kekewich J. affirmed. *In re HUGHES. BRANDON v. HUGHES* - C. A. 529

3. — Separate Estate—Restraint on Antici-

**HUSBAND AND WIFE**—continued.

pation—Married Woman—Admission of Cesser of Interest—Estoppel.

A married woman was entitled to the income of property during her life, for her separate use without power of anticipation, subject to a proviso that on a specified event her interest should cease, and the property be held in trust for her husband. In order to assist her husband to make an arrangement with a creditor, she executed a deed-poll, whereby she admitted (believing then that it was true, though, as she afterwards alleged, it was not in fact true) that the event mentioned in the proviso had occurred, and that her life interest had determined, and she released that interest in favour of her husband. On the faith of this deed the creditor entered into arrangements with the husband for his benefit. The wife subsequently, notwithstanding the deed, claimed to receive the income of the property during her life:—

*Held*, that she could not by admission or estoppel or in any other way by her own act get rid of the protection afforded by the restraint on anticipation, and that her right to receive the income was unaffected by her admission contained in the deed-poll.

Decision of Kekewich J., [1897] 2 Ch. 223, affirmed. *LADY BATEMAN v. FABER* C. A. 144

4. — Separate Estate—Restraint on Anticipation—Married Woman—Payment of Husband's Debts—Exoneration—Indemnity against Husband—Order removing Restraint—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

A wife entitled under a settlement to a life interest in property subject to a restraint from anticipation obtained from the Court, for the purpose of raising money to pay off her husband's debts, two orders under s. 39 of the Conveyancing and Law of Property Act, 1881, charging her life interest with the sums of 23,000*l.*, and 22,000*l.* She afterwards brought an action against her husband for a declaration that he was liable to indemnify her against the two charges created on her separate property for the payment of his debts, and the action was dismissed by Kekewich J. (see [1898] 1 Ch. 47).

Upon appeal, it was *held* that, under the circumstances of the case, no inference could be drawn in favour of the wife of any right to be indemnified by her husband, and the appeal was dismissed.

The doctrine that if a wife charges her separate property to pay her husband's debt she is *prima facie* regarded as lending, and not giving him the money raised, and as entitled to have the property exonerated by him, is purely equitable. It is based upon an inference to be drawn from the circumstances of each case, and there may be circumstances which prevent it from arising; so that until an inference in favour of the wife arises, there is no presumption for the husband to rebut.

In cases where orders have been made under s. 39 of the Act of 1881, it is the order of the Court which binds the estate of the wife, and not what she does when the restraint on anticipation is removed; and although it might be convenient

**HUSBAND AND WIFE—continued.**

for the order to indicate the husband's liability to indemnify the wife in cases where it is intended he should be liable to do so, the silence of the order in this respect does not negative the existence of the wife's right to indemnity where it can be inferred from the circumstances. *PAGET v. PAGET* - - - - **C. A. 470**

**5. — Wife's Conveyance—Married Woman —Mortgage—Separate Property—Conveyance to Purchaser by Mortgagor and Mortgagee—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 5—Acknowledgment of Deed unnecessary.**

A married woman, to whom, subsequently to the Married Women's Property Act, 1882, real estate is conveyed by way of mortgage to secure money belonging to her as her separate property, can convey to a purchaser from the mortgagor without the concurrence of her husband, or acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act.

The decision in *In re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358, distinguished, as not being applicable to the case of a married woman who is a mortgagee, and not a trustee. *In re BROOKE AND FREMLIN'S CONTRACT*

**Kekewich J. 647**

**IDENTITY—Error of subscriber as to, of company —Alleged contract of membership 110**  
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**IMPROVEMENT—Rent-charge—Redemption—Repayment to tenant for life - 508**  
*See SETTLED LAND. 1.*

**INCOME—Capital or—Copyholds—Custom—Fines on renewal of leases for lives 300**  
*See TENANT FOR LIFE AND REMAINDER-MAN.*

**—Capital or—Dividends—Public company—Apportionment - - - 115**  
*See WILL. 6.*

**INCUMBRANCE - - - 343, 350, 488**  
*See MORTGAGE. 1—3.*

**INDEMNITY—Payment of husband's debts—Separate estate—Restraint on anticipation - - - 470**  
*See HUSBAND AND WIFE. 4.*

**INFANTS—Contingent remainders—Intermediate rents—Legal and equitable limitations - - - 523**  
*See WILL. 5.*

**INFRINGEMENT—Book—Piracy—Combining causes of action - - - 58**  
*See COPYRIGHT.*

**INJUNCTION—Contract of Service—Agreement to Devote Whole Time—Unreasonable Negative Stipulation—Breach of Contract.**

A traveller for the plaintiffs, a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business, or transact any business with any other person or persons than the plaintiffs for a term of ten years. The traveller having left the plaintiffs' employ and entered that of another firm, the plaintiffs moved

**INJUNCTION—continued.**

for an injunction to restrain him from engaging in any other business, and from acting as a traveller for any other firm of wine merchants during the term of ten years:—

*Held*, that the negative stipulations in this contract were unreasonable and ought not to be enforced, and that the application must therefore be refused. *EHRMAN v. BARTHOLOMEW*

**Romer J. 671**

**—Costs—Dismissal of action against corporation - - - 525**  
*See PRACTICE. 2.*

**—Similarity of name—Deception - 539**  
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*See TRADE NAME. 2.*

**INSOLVENT ESTATE—Solicitor-executor—Profit costs—Power to charge - - 297**  
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**INSPECTION—Banking account—Discovery—Bankers' Books Evidence Act - 1**  
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**—Register of members—Right to take copies**  
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**INTEREST—Delay in completion—Defect in title unknown to vendor - - 433**  
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**—Loss of—Executor—Wilful default—Breach of duty - - - 162**  
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**—Proviso that interest should be "punctually paid" - - - 343**  
*See MORTGAGE. 1.*

**INTERIM USER—Land not immediately required for purpose for which it was acquired - - - 66**  
*See LOCAL GOVERNMENT. 2.*

**INTERNATIONAL LAW—Marriage—Domicil—Matrimonial Domicil—Change of Domicil—After-acquired Property—Movable Goods—French Law—Community of Goods.**

Where a Frenchman and a Frenchwoman marry in France without entering into any marriage contract, their respective rights to movable property subsequently acquired by them or either of them during the coverture are governed by the law of the matrimonial domicil and are not affected by any change of domicil, even though the property may have been acquired during the new domicil.

A Frenchman and a Frenchwoman, both poor, married in France without any express marriage contract. Subsequently they came to reside in England and acquired an English domicil. While domiciled in England the husband amassed a large fortune and died, having purported to dispose of all his property by an English will, but leaving his wife surviving:—

*Held*, that, as to "movable goods" the French marriage law as to community of goods prevailed, and that the widow was therefore entitled to one-half of the movable goods. *In re DE NICOLS. DE NICOLS v. CURLIER* - **Kekewich J. 403**

**2. — Sovereign, Action by Foreign—Dis-**



**INTERNATIONAL LAW**—*continued*.

*covery*—*Cross Proceedings*—*Counter-claim for Damages struck out*.

A foreign Sovereign suing in the courts of this country submits to the jurisdiction to the extent only that (1.) he must give discovery; (2.) cross proceedings in mitigation of the relief claimed by him can be taken against him.

A foreign State sued to restrain dealing with, and for the appointment of a new trustee of, funds lodged in England in the names of a trustee for the plaintiffs and a trustee for the defendants who hold a concession from the plaintiffs for the construction of a railway in their territory. A counter-claim for damages in respect of alleged breaches of the terms of the concession was struck out. *SOUTH AFRICAN REPUBLIC v. LA COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD* - - - North J. 190

**INVESTMENT**—Advised by solicitor to trustees—Contributory mortgage—Priority 212  
See *TRUSTEE*. 3.

**JAMAICA**—Property in—Probate duty—Local situation of asset - - - 89  
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**JOINTURE**—Deeds executed by successive tenants for life under powers conferred by will—Sale by tenant for life - 617  
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**JURISDICTION**—Charity Commissioners—Exemption from—"Any cathedral, collegiate, chapter, or other schools"—*Ejusdem generis* Rule - - 610  
See *CHARITY*. 2.

— Receiver—Power of debenture-holder to appoint—Fiduciary power - 133  
See *COMPANY*. 4.

— Residence out of—Foreign curator—Transfer of English stocks and shares - 267  
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— Service of notice out of—Writ - 283  
See *PRACTICE*. 5.

**LANDLORD AND TENANT**—*Forfeiture of Lease*—*Breach of Covenant*—*Notice*—*Sufficiency*—*Right to Possession*—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c. 41*), s. 14.

A notice served by a lessor on his lessee under s. 14 of the *Conveyancing Act*, 1881, merely informing the lessee that he "has not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is not sufficient, as it does not direct the attention of the lessee to the particular breaches complained of, so as to give him an opportunity of remedying them before an action is brought against him.

*Fletcher v. Nokes*, [1897] 1 Ch. 271, followed.

The fact that such a notice sufficiently specifies other breaches of covenant which are complained of will not make the notice sufficient within the section. *In re SERLE*. GREGORY *v.* SERLE

Kekewich J. 652

**LEASE**—Fines on renewal of leases for lives—Copholds—Income or capital - 300  
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**LEASE**—*continued*.

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See *Cases under WILL*.

**LIABILITY**—Covenants—Leaseholds—Tenant for life—Remainderman - - 232  
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— For deposit—Specific performance—Delay  
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**LIMITATION**—By articles of association—Winding-up—Contributory—Right to petition  
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**LIMITATIONS**—Legal and equitable—Contingent remainders—Infants—Intermediate rents - - - 523  
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**LIQUIDATOR**—"Undistributed assets"—Companies Liquidation Account - 444  
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**LIS PENDENS**—Vacating registration—Incorporating order in judgment - 313  
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**LOCAL GOVERNMENT**—*Costs*—*Municipal Corporation*—*Parliamentary Opposition*—"Rights, Privileges, and Duties"—*Application of Borough Fund*—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c. 50*), s. 140, *Sched. V., Part II.* (12).

An alteration in the price of gas in the district of a municipal corporation, a large consumer for public lighting and otherwise, does not affect its "rights, privileges, and duties" within the principle of the decision in *Attorney-General v. Mayor of Brecon*, (1878) 10 Ch. D. 204.

At the instance of a gas company, suing as ratepayers, a municipal corporation, who had not complied with the requirements of s. 4 of the *Borough Funds Act*, 1872, was restrained from applying any part of its borough fund (there being no surplus) to the costs of opposition before Parliament to a bill promoted by the gas company, which would affect the price of gas. *ATTORNEY-GENERAL v. SWANSEA CORPORATION* North J. 602

2. — *Interim User*—*Land not immediately required for the Purpose for which it was acquired*—*Public Health Act*, 1875 (38 & 39 *Vict. c. 55*), s. 175.

Where land has been acquired by an urban authority under the powers of the *Public Health Act*, 1875, and only part of the land so acquired is immediately required for the purposes for

**LOCAL GOVERNMENT—continued.**

which it was acquired, while the remaining part may be ultimately required for the same purposes, it is not incumbent on the urban authority to sell the vacant land under s. 175 of the Act; but they may retain the same, and use it for some other lawful purpose, such as a recreation ground or the like, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with its use whenever required for the ultimate purpose for which it was acquired.

*Attorney-General v. Corporation of Southampton*, (1858) 1 Giff. 363, and *Bayley v. Great Western Ry. Co.*, (1884) 26 Ch. D. 494, discussed and distinguished. *ATTORNEY-GENERAL v. TEDDINGTON URBAN DISTRICT COUNCIL* *Romer J. 66*

3. — “Sewer” or “Drain”—*Railway Company—Sewer made under Local or Private Act—Vesting in Local Authority—Railways Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), s. 68—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, 327.

A railway company, whose special Act expressly incorporated the Railways Clauses Consolidation Act, 1845, constructed land drains for the purpose of conveying surface water from lands adjoining the railway, and these land drains were, without the knowledge or consent of the company, used by a rural sanitary authority to convey sewage from certain houses within the district of such authority:—

*Held*, affirming the judgment of Stirling J., [1898] 1 Ch. 34, that these drains were “sewers” within the meaning of the Public Health Act, 1875, but that they were sewers made and used for the purpose of draining land under a local or private Act of Parliament within the second exception in s. 13 of that Act, and did not vest in the local authority; and consequently that the company were entitled to an injunction to restrain the sanitary authority from so using them. *LONDON AND NORTH WESTERN RAILWAY COMPANY AND GREAT WESTERN RAILWAY COMPANY v. RUNCORN RURAL DISTRICT COUNCIL* *C. A. 561*

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**LODGERS**—“Private residence”—Boarding and lodging scholars attending school 424  
*See COVENANT.*

**LUNACY**—*Jurisdiction, Residence out of—Foreign Curator—English Stocks and Shares—Transfer, Order for—“Vested”—Discretion—Maintenance of Lunatic—Lunacy Act, 1890* (53 & 54 Vict. c. 5), ss. 134, 341.

The foreign curator of the property and person of a lunatic resident out of the jurisdiction is not entitled as of right to an order under s. 134 of the Lunacy Act, 1890, for the transfer to him of English stocks or shares standing in the name of the lunatic, although “vested” in the curator under that section. The Court has, under that section and its general jurisdiction in Lunacy over the personal property of a lunatic, a discretion as to making or refusing the order; and therefore, as a condition for obtaining the order, the curator must first satisfy the Court by evidence

**LUNACY—continued.**

that the property is required for the maintenance or other purposes of the lunatic.

*In re Brown*, [1895] 2 Ch. 666, considered.  
*In re KNIGHT (A LUNATIC)* - - - *C. A. 257*

2. — *Maintenance—Execution Creditor—Priority—Lunacy Act, 1890* (53 & 54 Vict. c. 5), ss. 116, 117, 120.

The Court in Lunacy will not allow property of a lunatic in its custody to be applied in paying his creditors without first providing for his maintenance; but it has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the Court.

The issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor until an order is made shewing that the Crown has actually taken the property under its protection.

A judgment creditor of a person not found lunatic by inquisition, after receiving notice of the pendency of a summons in lunacy for the appointment of a receiver under s. 116 of the Lunacy Act, 1890, issued a *fi. fa.* under which the goods of the debtor were seized before any order was made upon the summons. A receiver was afterwards appointed while the goods were in the possession of the sheriff:—

*Held*, that the Court had no jurisdiction to order a sale of the goods under s. 117 of the Lunacy Act, 1890, for the maintenance of the alleged lunatic in priority to the claims of the creditor.

*In re Winkle*, [1894] 2 Ch. 519, distinguished.  
*In re CLARKE* - - - - - *C. A. 336*

**MAINTENANCE**—Lunatic—Execution creditor—Priority - - - - - 336  
*See LUNACY. 2.*

— Residence out of jurisdiction—Foreign curator—Transfer of English stocks—Discretion - - - - - 257  
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**MARRIAGE**—Domicil—Movable goods—French law—Community of goods - 403  
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**MARRIAGE SETTLEMENT**—Power of appointment among children—Remoteness—Rule against perpetuities - - 498  
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**MARRIED WOMAN** - 144, 470, 529, 637, 647  
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**MAXIM OF LAW**—*Damnum absque injuria*—Underselling—Damage to manufacturer  
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**MISREPRESENTATION**—Underselling—Damage to manufacturer—*Damnum absque injuria* - - - - - 274  
*See TRADE COMPETITION.*



**MORTGAGE**—Interest—Mortgage Deed—Construction—Proviso that Interest should be "punctually" paid.

A mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed, "if in the meantime every half-yearly payment of interest shall be punctually paid":—

*Held*, by the Court of Appeal (reversing the judgment of Kekewich J.), that payment "punctually" meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment. LEEDS AND HANLEY THEATRE OF VARIETIES v. BROADBENT

C. A. 343

2. — Mortgage of Share in Trust Fund—Right of Mortgagee to receive whole Amount of Share—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22, sub-s. 1.

A member of a land society mortgaged his share in the society to the plaintiff (another member of the same society) by a deed to which the powers conferred by the Conveyancing Act, 1881, Part IV., were incident. The mortgagor died intestate, and there was no legal personal representative of his estate. A sum of money having become due to the mortgagor's estate from the society, the plaintiff, relying upon his power to give a receipt under s. 22, sub-s. 1, of the Act, claimed to have the whole amount paid to him as mortgagee. The trustees, however, not being furnished with an account and having reason to believe it questionable how much was due on the mortgage, offered to pay the plaintiff so much of the money as upon taking an account should be found due to him, but declined to pay him without such an account.

In an action by the plaintiff to recover the money from the trustees, it was held by Kekewich J., upon the authority of *In re Bell*, [1896] 1 Ch. 1, that the trustees were entitled to act as they had done; and, upon their undertaking to pay the money into Court under the Trustee Act, 1893 (56 & 57 Vict. c. 53), the action was dismissed.

Upon appeal it was held by the Court that the trustees could not be said to have acted unreasonably; that the decision in *In re Bell* (of which their Lordships approved) was applicable; and that the judgment of Kekewich J. must be affirmed. HOCKEY v. WESTERN - C. A. 350

3. — Tacking—Mortgagor and Mortgagee—Subsequent Incumbrancer—Notice—Further Advances after Notice—Covenant by Mortgagee to make Further Advances—Priorities—Settlement—Life Interest—Alienation, Trust over on—Words of Futurity—Retrospective Operation—Past Alienation.

The doctrine in *Hopkinson v. Rolt*, (1861) 9 H. L. C. 514, that after notice of a mesne incumbrance the first mortgagee cannot, as against the later incumbrancer, tack to his debt further advances made to the mortgagor, does not apply to further advances made to the mortgagor in pursuance of an obligation or covenant on the part of the first mortgagee.

A trust in a settlement for payment of the

**MORTGAGE**—continued.

income of the trust fund to A. for life "or until he shall assign, charge or incumber, or affect to assign, charge or incumber" the same, though future in terms, has also a retrospective operation so as to include past acts.

*Manning v. Chambers*, (1847) 1 De G. & Sm. 282, and *Seymour v. Lucas*, (1860) 1 Dr. & Sm. 177, followed. WEST v. WILLIAMS Kekewich J. 488

— By one partner to secure debt of partnership—Sufficiency of partnership assets to answer all partnership debts - 667  
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— Equitable—Floating security—Priority—Negligence - - - 315  
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**MORTMAIN**—"Gift to such charitable institutions and objects as my trustees may determine"—Mixed fund - 565  
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**MOVABLE GOODS**—French law—Domicil—Community of goods - - 403  
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**NAME**—Similarity of—Deception—Injunction  
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**NOTICE**—Further advances after notice of subsequent incumbrance—Tacking - 488  
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**PARTIES**—Unnecessary or improper—Costs—Setting aside settlement - - - 306  
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**PARTNERSHIP**—*Arbitration—Agreement to refer—Power to expel Partner—Validity of Notice—Bona fides—Notice of Dissolution—Motion to stay Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.*

Articles of partnership provided that a partner might be expelled for breach of certain acts therein specified, and that if any question should arise whether a case had happened to authorize the exercise of this power, such question should be referred to arbitration. The defendants served a notice on the plaintiff to determine the partnership on the ground that he had committed a breach within the expulsion clause, but gave no details of the particular act complained of; the plaintiff thereupon brought an action to restrain the defendants from acting on this notice; the defendants moved to stay proceedings and refer all matters in dispute to arbitration:—

*Held*, that the preliminary question whether or not the notice of expulsion was valid was one more suitable for decision by the Court than by an arbitrator, and that as there was a suggestion of a fraudulent exercise of the power of expulsion, the Court, in the exercise of its discretion, ought not to stay proceedings and enforce a reference.

A partner is not entitled to spring a notice of dissolution on his co-partner without giving him some preliminary warning of the cause of complaint, and an opportunity of meeting the case alleged against him. *BARNES v. YOUNGS*

Romer J. 414

2. — *Dissolution—Action for—Compromise—Sale of Business to one Partner—"Assets"—Goodwill—Canvassing old Customers—Injunction.*

A. and B. had formerly carried on business in partnership, and B. had brought an action for rescission of the partnership on the ground of misrepresentations by A. This action was compromised on the terms that judgment should be entered for B. for 1200*l.*, the partnership to be dissolved, A. retaining the "assets." The goodwill was not specifically mentioned in the terms of the compromise. A. subsequently brought another action to restrain B. from canvassing the customers of the old firm. Upon motion for an interlocutory injunction:—

*Held*, that the relations of vendor and purchaser existed between the parties, that B. was subject to the ordinary obligations of a vendor, and that consequently, upon the authority of *Trego v. Hunt*, [1896] A. C. 7, A. was entitled to an injunction.

*Gray v. Smith*, (1889) 43 Ch. D. 208, and *Pearson v. Pearson*, (1884) 27 Ch. D. 145, considered. *JENNINGS v. JENNINGS* Stirling J. 378

3. — *Mortgage by one Partner to secure Debt of the Partnership—Devise of Real Estate—Sufficiency of Partnership Assets to answer all Partnership Debts—Real Estate Charges Act, 1854 (17 & 18 Vict. c. 118).*

The Real Estate Charges Act, 1854, commonly

**PARTNERSHIP**—*continued.*

called Locke King's Act, does not apply to the case of a charge created by one partner on his separate estate to secure a debt of the partnership where the partnership assets are sufficient to answer all the debts of the partnership. *In re RITSON. RITSON v. RITSON* - Romer J. 667

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**PATTERN**—Registration—Coffin-plates—Novel combination of old designs - 237  
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**PERPETUITY**—Period of ascertaining class—Gift of income to children of A. - 227  
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**PIRACY**—Book—Infringement—Combining causes of action - - - 58  
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**PORTIONS**—Rule against double—Legacy—Prepayment in testator's lifetime—Satisfaction - - - 142  
See POWER. 5.

**POSSESSION**—Of title-deeds—Priority—Negligence - - - 315  
See COMPANY. 3.

**POWER**—Appointment—General Power—*French Will—Unattested Will—Execution of Power—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, 27—Lord Kingsdown's Act (24 & 25 Vict. c. 114), s. 1.*

A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law:—

*Held*, that the writing, even if admissible to probate under s. 1 of Lord Kingsdown's Act (24 & 25 Vict. c. 114), did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by ss. 9 and 10 of the Wills Act (1 Vict. c. 26).

*In re Kirwan's Trusts*, (1883) 25 Ch. D. 373, followed.

*D'Huart v. Harkness*, (1865) 34 Beav. 324, considered. *HUMMEL v. HUMMEL*

Kekewich J. 642

2. — *Appointment—Marriage Settlement—Power of Appointment among Children—Exercise of Power—Appointment to Daughters "who shall hereafter marry"—Appointment of income between*

**POWER**—*continued.*

*Daughters while Unmarried—Gift over on Death or Marriage of Surviving Unmarried Daughter to other Children and any Daughters then Married—Remoteness—Perpetuities, Rule against.*

By a marriage settlement in 1793 a fund was settled in trust for the husband and wife successively for life with remainder for children of the marriage as the husband and wife should jointly appoint. In 1835, there being then seven children of the marriage, including three unmarried daughters, the husband and wife appointed out of the fund 1500*l.* to be paid to each of the three unmarried daughters "who should thereafter marry"; and, so long as those three daughters, or any or either of them, should be living and unmarried, directed that the income of the residue of the fund should be paid to them, or such of them as should from time to time be living and unmarried, equally; and, "in case one or two only of them should marry" (which happened) then that, after the death or marriage of such one as should be last living and unmarried, the capital of the residue should be paid to the four other children and such of the three unmarried daughters "as should marry as aforesaid," equally:—

*Held*, (1.) that the ultimate gift over of the residue of the fund was void for remoteness, as the class was not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors; (2.) that the appointment of the three sums of 1500*l.* was also void for remoteness, as it could not be ascertained whether a daughter would marry within twenty-one years after the death of the survivor of the appointors; and (3.) that the appointment of the income of the residue of the fund to the three unmarried daughters was a valid appointment of one-third to each daughter so long as she was living and unmarried; but, so far as it purported to be a gift over of such one-third on her marriage, was void for remoteness.

*Wainwright v. Miller*, [1897] 2 Ch. 255, approved.

*In re GAGE. HILL v. GAGE* *Kekewich J.* 498

**3. — Appointment—Real Estate—Devise to Uses—Power of Sale—Appointment to Trustees for Objects—Trust for Sale—Legal Estate.**

A testator devised real estate to the use of his daughter for life, with remainder to the use of such of her children, for such estates or interests and in such manner as she should by will appoint, and in default of appointment to the use of her children as tenants in common. And he empowered the trustees of his will to sell the property with the consent in writing of the persons for the time being in possession under the foregoing limitations if adult, and if not, then at the discretion of the trustees.

By her will the daughter, in exercise of her power, appointed the real estate to trustees in trust for sale and to stand possessed of the proceeds upon trusts for her children:—

*Held*, that the legal estate was well appointed by the daughter's will to her trustees in trust for sale, and that they were therefore the proper persons to sell.

An appointment of real estate under a power

**POWER**—*continued.*

to trustees for objects of the power passes the legal estate in it as effectively as if the property appointed were money instead of land.

*Kenworthy v. Bate*, (1802) 6 Ves. 793, and *Cowx v. Foster*, (1860) 1 J. & H. 30, discussed. *In re PAGET. In re MELLOR. MELLOR v. MELLOR* - - - *Kekewich J.* 290

**4. — Appointment—Stock sufficient to raise a "Net" Sum—Incidence of Succession Duty.**

The donee of a special power of appointment contained in a settlement appointed that so much of the stocks and securities held by the trustees "as shall be sufficient to raise the net sum of 2000*l.*" should, subject to the life interest therein of the appointor, "henceforth belong and be vested in" E, an object of the power, "and be held in trust for him":—

*Held*, that the appointee took the fund free from succession duty.

*Decision of Stirling J.*, [1897] 1 Ch. 888, reversed.

*Banks v. Brailhwaite*, (1862) 32 L. J. (Ch.) 35, questioned. *In re SAUNDERS. SAUNDERS v. GORE* *C. A.* 17

**5. — Special Power—Appointment to one of Several Objects of Power—Subsequent Appointment among all the Objects equally—Loco parentis, Person in—Double Portions, Rule against—Legacy—Prepayment in Testator's Lifetime—Satisfaction.**

*Decision of Stirling J.*, [1897] 2 Ch. 574, reversed on appeal, it appearing from the evidence that the child to whom appointments of sums amounting to one-third of the fund had been made by deed had in the lifetime of the appointor accepted these sums in prepayment or anticipation of the one-third appointed to her by the will of the appointor. *In re ASHTON. INGRAM v. PAPILLON* - - - *C. A.* 142

— Appointment—Recital—Estoppel—Construction of settlement - - - *82*

See VOLUNTARY SETTLEMENT.

**PRACTICE**—*Appeal from Judge without Jury—Appeal raising Questions of Fact.*

The rehearing on appeal of a case tried by a judge without a jury is not governed by the rules applicable where there has been a trial and verdict by a jury. The Court of Appeal must act on its own considered conclusion on questions of fact as well as law. *COGLAN v. CUMBERLAND* *C. A.* 704

**2. — Costs—Injunction—Dismissal of Action against Corporation—"Action"—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, subss. (b), (c).**

The word "action," as used in s. 1 of the Public Authorities Protection Act, 1893, includes all actions in the Chancery Division, whether actions for an injunction or actions partly for an injunction and partly for damages. Therefore in any such action against a public authority judgment for the defendants carries the right to an order for costs to be taxed as between solicitor and client, and the Court has no discretion in the matter. *HARROP v. OSSETT CORPORATION*

*Romer J.* 525



**PRACTICE—continued.**

3. — *Discovery—Inspection of Banking Account—Bankers' Books Evidence Act, 1879* (42 & 43 Vict. c. 11), s. 7.

An order for inspection of entries in a banker's books under s. 7 of the Bankers' Books Evidence Act, 1879, will as a general rule be made only where there are entries in an account which is in form or substance the account of one of the parties to the litigation. If the Court has jurisdiction under that section to order inspection of the banking account of a person not concerned with the litigation, it will exercise that jurisdiction with the greatest caution.

The plaintiff sued to rescind a contract for purchase by him of shares in a company from the defendant, on the ground that the defendant had induced him to enter into the contract by misrepresentations, one of which was that the company had a certain large balance at its bankers at that time. Before the action was set down for trial the plaintiff applied to the Court under s. 7 of the Bankers' Books Evidence Act, 1879, for liberty to inspect and take copies of any accounts of the company in their bankers' books. Kekewich J. made an order for inspection with the qualification, "but such inspection is to be limited to shewing the balance of the said company in the books of the said bankers on 2nd of December, 1895":—

*Held*, that this order must be discharged.

POLLOCK v. GARLE - - - C. A. 1

4. — *Lis Pendens—Registration, Order Vacating—Vendor and Purchaser—Specific Performance—Incorporating Order in Judgment—Lis Pendens Act, 1867* (30 & 31 Vict. c. 47), s. 2.

A specific performance action, which had been registered by the plaintiff as a *lis pendens*, was at the trial dismissed with costs. Upon the application of the defendant the Court included in the judgment an order, under 30 & 31 Vict. c. 47, s. 2, vacating the registration unless the plaintiff set down an appeal from the judgment within a fortnight. BAXTER v. MIDDLETON

Kekewich J. 313

5. — *Service—Writ—Service of Notice out of Jurisdiction—Rules of the Supreme Court, 1883, Order XI., r. 1 (e), (g).*

J. & Co., who carried on business in London, deposited certain policies of life assurance with the plaintiffs, a German bank, as security for advances, and afterwards created a second charge upon the same policies in favour of E. The plaintiffs subsequently acquired the equity of redemption in the policies, and caused it to be transferred to P. & F. as trustees for the plaintiffs. P. & F. resided in England; E. resided in Germany. The plaintiffs brought an action for foreclosure against P. and F. and obtained leave to give notice, in lieu of service, of the writ to E. out of the jurisdiction. Upon motion to discharge that order:—

*Held*, (1.) that the action was not founded on any breach of contract, and therefore the case did not come within Order XI., r. 1 (e); and (2.) that inasmuch as no actual relief was claimed against P. and F., they were not properly made defendants, but should have been joined as co-plaintiffs; the action was, therefore, not properly brought

**PRACTICE—continued.**

against them within the meaning of Order XI., r. 1 (g), and the order for service out of the jurisdiction must be discharged. DEUTSCHE NATIONAL BANK v. PAUL - - - Stirling J. 283

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- Sect. 19 of the Finance Act, 1896, is not retrospective; consequently the settlement estate duty leviable in respect of a legacy settled by the will of a person dying after the commencement of the Finance Act, 1894, but before the commencement of the Finance Act, 1896, is still payable out of residue in accordance with *In re Webber*, [1896] 1 Ch. 914. *In re GIBBS. THORNE v. GIBBS*  
*Stirling J. 625*
2. — *Probate Duty—Property in Jamaica—English Will—Trust for Sale—Local Situation of Asset.*
- A testator, who at the date of his will and death was living and domiciled in England, made an English will whereby in effect he devised and bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life and their issue, and upon the deaths of those persons and failure of issue upon trust to sell the plantation and divide the proceeds amongst several persons therein named. The trustees were at the above dates all domiciled in the United Kingdom; and one of them after the testator's death proved the will in England and acted as trustee, and held as trustee in this country the plantation upon the trusts of the will.
- The trust for sale ultimately took effect, and



**REVENUE—continued.**

the proceeds of sale of the plantation became divisible amongst the several persons named in that behalf in the will, or their legal personal representatives.

One of those persons, who was at the time of his death living and domiciled in England, died while the persons entitled for life were in existence, and the question was whether probate duty was or was not payable here on his death in respect of his interest under the will:—

*Held*, that the interest of the legatee under the will was an English equitable chose in action, recoverable in England, and an English and not a foreign asset, and as such was subject to probate duty here.

*Lord Sudeley v. Attorney-General*, [1897] A. C. 11, followed. *In re SMYTH. LEACH v. LEACH*  
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**SETTLED LAND**—*Rent-charge—Redemption—Repayment to Tenant for Life—Capital Money—Improvement—Evidence—Settled Land Act, 1882* (45 & 46 *Vict. c. 38*), s. 25—*Settled Land Act, 1887* (50 & 51 *Vict. c. 30*), s. 1.

The tenant for life of settled estates, in order to obtain a reduction of the rate of interest payable on money borrowed for improvements and secured by rent-charges under the Improvement of Land Act, 1864, caused the rent-charges to be transferred to an insurance society on payment to the original holders of a lump sum in consideration of their consenting to the transfer:—

*Held*, that the repayment of this sum to the tenant for life would not be an expenditure "in redeeming" the rent-charges, "or otherwise providing for the payment thereof," within s. 1 of the Settled Land Act, 1887, and therefore ought not to be made out of capital money in the hands of the trustees of the settlement.

The fact that the commissioners under the Act of 1864 sanctioned an improvement, in respect of which a rent-charge was created, as coming within a provision in that Act substantially identical with a provision in the Settled Land Act, 1882, was treated by the Court as evidence that such improvement was within the last-mentioned provision. *In re VERNEY'S SETTLED ESTATES* - - - Kekewich J. 508

2. — *Settlement—Subsequent Settlement of other Land subject to Mortgages upon identical Trusts—Compound Settlement—Payment off of Mortgages by Mortgage of Lands comprised in both Settlements—Settled Land Act, 1882* (45 & 46 *Vict. c. 38*), s. 2, sub-s. 1—*Settled Land Act, 1890* (53 & 54 *Vict. c. 69*), s. 11.

Where an estate A. has been settled, and afterwards by a separate instrument the equity of redemption in an estate B. is settled on like trusts, the two settlements form one compound settlement within s. 2, sub-s. 1, of the Settled Land Act, 1882; and when the mortgage on estate B. has to be paid off, the moneys required for that purpose may be raised by a mortgage upon both estates A. and B. by the tenant for life under s. 11 of the Settled Land Act, 1890.

*In re Mundy's Settled Estates*, [1891] 1 Ch. 399, and *In re Byng's Settled Estates*, [1892] 2 Ch. 219, discussed. *In re LORD MONSON'S SETTLED ESTATES* - - - Romer J. 427

3. — *Settlement created by Will—Jointure Deeds executed by Successive Tenants for Life under Powers conferred by the Will—Sale by Tenant for Life under Settled Land Acts—Appointment of Trustees of Compound Settlement consisting of Will and Jointure Deeds—Settled Land Act, 1882* (45 & 46 *Vict. c. 38*), ss. 2, 20

**SETTLED LAND—continued.**

—*Settled Land Act, 1890* (53 & 54 Vict. c. 69), s. 4.

By a will real estate was devised to A. for life with remainder to his first and other sons successively in tail male, with like remainders to B. and C. and then over. A. and C. were dead, and B. was tenant for life in possession. A., B., and C. had all executed jointure deeds under a power conferred by the settlement; that executed by A. was in operation and constituted an existing charge on the settled property. Trustees of the will had been appointed for the purposes of the Settled Land Acts. B. having contracted, under the powers conferred upon him by those Acts, to sell a portion of the estate, the purchaser insisted that trustees should be appointed of the compound settlement created by the will and the several jointure deeds:—

*Held*, (1.) that the jointures were not charges upon the estate of the tenant for life within the meaning of s. 4 of the Settled Land Act, 1890; (2.) that the will by itself constituted a settlement within the meaning of s. 2 of the Settled Land Act, 1882; (3.) that under s. 20 of the same Act B. could convey the land discharged from the jointures, they being "estates, interests, or charges subsisting under the settlement" within that section; and consequently that B. could make a good title to the property, and the trustees of the will could give a good discharge for the purchase-money.

*In re Tibbitts' Settled Estates*, [1897] 2 Ch. 149, and *In re Meade's Settled Estates*, [1897] 1 I. R. 121, distinguished. *In re KEOK AND HART'S CONTRACT* — — — **Stirling J. 617**

**SETTLEMENT—Repairs chargeable to Capital—Tenant for Life and Remainderman.**

Necessary repairs on real estate purchased in accordance with a power in a testamentary settlement of personality, by the direction or with the consent of the tenant for life, to invest in (inter alia) land to be held as personal estate:—

*Held*, chargeable to capital. *In re FREMAN. DIMOND v. NEWBURN* — — — **North J. 28**

2. — *Setting aside Settlement, Action for—Costs—Settlor's own Property—Income—Life Interest—Bankruptcy, Trust determinable on—Creditors—Void Limitations—Parties—Trustees—Beneficiaries—Unnecessary or improper Parties.*

The trustees of a settlement who are defendants to an action successfully brought against them to set aside the settlement are entitled, if they have acted properly in the discharge of their duties as trustees and not put the plaintiff to unnecessary expense, to retain their costs of the action, as between solicitor and client, out of the trust fund before handing it over under the judgment.

An action having been brought by a settlor's trustee in bankruptcy against the trustees of the settlement of the settlor's own property to set aside limitations cutting down his life interest in the event of his bankruptcy, the beneficiaries taking under the limitations over were subsequently added by the plaintiff as defendants at the suggestion of the defendants the trustees, and at the trial appeared to defend separately from their co-defendants the trustees. The action

**SETTLEMENT—continued.**

being successful, the trustees were allowed to retain their costs as between solicitor and client out of income in their hands, but the beneficiaries, having chosen to defend, although they had been unnecessarily, but not improperly, made parties, were not allowed any costs. *MERRY v. POWNALL* **Kekewich J. 306**

— Alienation, Trust over on—Retrospective operation—Past alienation — **488**  
*See MORTGAGE. 3.*

— Compound settlement—Payment off of mortgages — — — **427**  
*See SETTLED LAND. 2.*

— Construction—Power of appointment—Recital—Estoppel — — — **82**  
*See VOLUNTARY SETTLEMENT.*

— Estate duty—Incidence — — **625**  
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— Jointure deed executed by successive tenants for life under powers conferred by will—Sale by tenant for life — — **617**  
*See SETTLED LAND. 3.*

— Power of appointment among children—Remoteness—Rule against perpetuities *See POWER. 2.* **498**

**SEWER**—Railway company—Sewer made under local or private Act—Vesting in local authority — — — **561**  
*See LOCAL GOVERNMENT. 3.*

**SHARES**—Issue of, as fully paid—Registered contract—Consideration—Rectification of register — — — **515**  
*See COMPANY. 9.*

— Transfer—Foreign curator—"Vested"—Discretion—Maintenance of lunatic **257**  
*See LUNACY. 1.*

**SINKING FUND**—Debenture—Redemption—Prospectus — — — **263**  
*See COMPANY. 5.*

**SOLICITOR**—Costs—Taxation—Business done while uncertificated—Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12 (1).

In taxing a solicitor's bill of costs, items relating to business done while the solicitor had not a certificate must be disallowed.

*In re Jones*, (1869) L. R. 9 Eq. 63, is superseded. *In re SWEETING* — — — **North J. 268**

2. — *Lien for Costs—Waiver—Security given by Client.*

A client, on retaining a solicitor to negotiate for her a loan, upon the security of a reversionary interest to which she was entitled, signed a document by which she charged that interest with the payment of the solicitor's costs:—

*Held*, on the authority of *In re Taylor, Stileman, and Underwood*, [1891] 1 Ch. 590, that by taking this security the solicitor had waived his right to a lien in respect of his costs upon the documents belonging to the client which were in his possession. *In re DOUGLAS NORMAN & Co.* **North J. 199**

3. — *Solicitor-Executor—Profit costs—Will—Trustee—Power to Charge—"Legacy"—Insolvent Estate.*

A solicitor who is the sole executor and

**SOLICITOR**—*continued.*

trustee of a will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the will contains the usual clause empowering him to charge for work done: for the clause being in effect a legacy of profit costs to the solicitor he cannot claim it as against creditors. *In re WHITE. PENNELL v. FRANKLIN* - - - **Kekewich J. 297**

— Authority of—Cheque—Tender—Validity  
See **TENDER. 2.** **27**

— Costs as between, and client—Dismissal of action against corporation - - - **525**  
See **PRACTICE. 2.**

— Investment advised by solicitor to trustees  
— Contributory mortgage—Priority **212**  
See **TRUSTEE. 3.**

**SOVEREIGN**—Action by foreign—Cross proceedings - - - **190**  
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**SPECIAL POWER**—Rule against double portions  
— Legacy—Prepayment in testator's lifetime - - - **142**  
See **POWER. 5.**

**SPECIFIC PERFORMANCE**—Delay—Lien for deposit - - - **478**  
See **VENDOR AND PURCHASER. 5.**

— *Lis pendens*—Vacating registration—Incorporating order in judgment - **313**  
See **PRACTICE. 4.**

**STATUTE**—Construction—Conflict of Statutes—*Annuity.*

A Provisional Order authorizing an electric lighting undertaking came into operation on June 27, 1892. It gave a municipal corporation power to purchase the undertaking compulsorily on terms of issuing or transferring to the undertakers such an amount of the corporation stock "as will produce by the interest thereon an annuity of 5 per cent." on capital properly expended. Another Provisional Order, coming into operation on June 28, 1892, took away a power the corporation had, but had not exercised, to issue irredeemable stock. The statutes confirming the two orders received the Royal assent on June 27, 1892:—

*Held*, (1.) that the statutory price for the undertaking was an amount of irredeemable stock; (2.) that the corporation were not by implication authorized to issue irredeemable stock for the purpose of purchasing the undertaking; (3.) that, therefore, the power to purchase compulsorily was in abeyance so long as the corporation had no power to issue irredeemable stock. **SHEFFIELD CORPORATION v. SHEFFIELD ELECTRIC LIGHT COMPANY** - **North J. 203**

**STATUTES**:—

9 Geo. 2, c. 36, ss. 1, 3, 4—*Mortmain* - **565**  
See **WILL. 3.**

1 Vict. c. 26, ss. 9, 10, 27—*Wills* - **642**  
See **POWER. 1.**

5 & 6 Vict. c. 45, ss. 15, 23, 26—*Copyright* **58**  
See **COPYRIGHT.**

8 & 9 Vict. c. 16, ss. 71, 85, 86, 99—*Companies Clauses* - - - **358**  
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**STATUTES**—*continued.*

8 & 9 Vict. c. 20, s. 68—*Railways Clauses*; **561**  
See **LOCAL GOVERNMENT. 3.**

16 & 17 Vict. c. 137, ss. 62, 66—*Charitable Trusts* - - - **610**  
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17 & 18 Vict. c. 113—*Locke King's Act* - **687**  
See **PARTNERSHIP. 3.**

20 & 21 Vict. c. 85, ss. 21, 25, 26—*Matrimonial Causes* - - - **529**  
See **HUSBAND AND WIFE. 2.**

24 & 25 Vict. c. 114, s. 1—*Wills* - - **642**  
See **POWER. 1.**

25 & 26 Vict. c. 89, ss. 16, 38, 101—*Companies*  
See **COMPANY. 14.** **691**

— s. 32 - - - **596**  
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— s. 35 - - - **104**  
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— s. 38, sub-s. 7 - - - **324**  
See **COMPANY. 16.**

— s. 82 - - - **122**  
See **COMPANY. 13.**

— ss. 109, 133 - - - **451**  
See **COMPANY. 19.**

30 & 31 Vict. c. 47, s. 2—*Lis pendens* - **313**  
See **PRACTICE. 4.**

30 & 31 Vict. c. 131, s. 25—*Companies* - **515**  
See **COMPANY. 9.**

33 & 34 Vict. c. 35, ss. 5, 7—*Apportionment* **115**  
See **WILL. 6.**

37 & 38 Vict. c. 68, s. 12, sub-s. 1—*Solicitors*  
See **SOLICITOR. 1.** **268**

38 & 39 Vict. c. 55, ss. 4, 13, 327—*Public Health* - - - **561**  
See **LOCAL GOVERNMENT. 3.**

— s. 175 - - - **66**  
See **LOCAL GOVERNMENT. 2.**

38 & 39 Vict. c. 77, s. 10—*Judicature* - **691**  
See **COMPANY. 14.**

42 & 43 Vict. c. 11, s. 7—*Bankers' Books Evidence* - - - **1**  
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43 & 44 Vict. c. 19, s. 7—*Companies* - **100**  
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44 & 45 Vict. c. 41, s. 3, sub-s. 6—*Conveyancing and Law of Property* - **419**  
See **VENDOR AND PURCHASER. 2.**

— s. 14 - - - **652**  
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— s. 22, sub-s. 1 - - - **350**  
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— s. 39 - - - **470**  
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45 & 46 Vict. c. 38, s. 2, sub-s. 1—*Settled Land*  
See **SETTLED LAND. 2.** **427**

— ss. 2, 20 - - - **617**  
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— s. 25 - - - **508**  
See **SETTLED LAND. 1.**

45 & 46 Vict. c. 50, s. 140, Sched. V., Part II. (12)—*Municipal Corporations* - **602**

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- 45 & 46 Vict. c. 75, ss. 1, 5—*Married Women*  
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- 46 & 47 Vict. c. 52, s. 38—*Bankruptcy* - 691  
*See COMPANY.* 14.
- ss. 44, 54 - - - 675  
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- 46 & 47 Vict. c. 57, ss. 47, 51, 60—*Patents, Designs, and Trade Marks* - 237  
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- 50 & 51 Vict. c. 30, s. 1—*Settled Land* - 508  
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- 53 & 54 Vict. c. 5, ss. 116, 117, 120—*Lunacy* 336  
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- s. 11 - - - 427  
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- 56 & 57 Vict. c. 61, s. 1, sub-ss. (b), (c)—*Public Authorities Protection* - 525  
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- 59 & 60 Vict. c. 28, ss. 19, 24, 39—*Finance Act*  
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- STAYING PROCEEDINGS**—Arbitration—Power to expel partner—Validity of notice  
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- STREET**—Soil of highway—Right of adjoining owner—Ad medium filum viæ - 659  
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- STRIKING OUT**—Statement of claim—Practice—“Highest net money tender” - 465  
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**TENANT**—Forfeiture of lease—Breach of covenant—Notice—Sufficiency - 652  
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**TENANT FOR LIFE**—Repayment to—Rent-charge—Redemption—Improvement—Evidence - 508  
*See SETTLED LAND.* 1.

— Sale by—Appointment of trustees of compound settlement consisting of will and jointure deeds - 617  
*See SETTLED LAND.* 3.

**TENANT FOR LIFE AND REMAINDERMAN**—Income or Capital—Copyhold—Custom—Fines on Renewal of Leases for Lives—Tenants not entitled to Renewal.

By the custom of a manor copyholds were granted on leases for lives at small quit rents and subject to heriots, on payment of arbitrary fines to the lord. There was no obligation on the lord to renew the leases. A tenant for life, unimpeachable for waste and having only an ordinary power of leasing for twenty-one years, as lord of the manor granted leases for lives and received fines:—

*Held*, that the fines, being received in the customary mode of enjoyment of the manor by the lord, were income and belonged wholly to him. *In re MEDOWS. NORIE v. BENNETT.*

Kekewich J. 300

— Leaseholds—Covenants—Rent—Repairs—Liability - 232  
*See WILL.* 8.

— Repairs chargeable to capital - 28  
*See SETTLEMENT.* 1.

**TENDER**—“Highest net Money Tender”—Contract for Sale—Practice—Striking out Statement of Claim—Rules of Supreme Court, Order XXV, r. 4.

The owner of certain coal mines proposed to receive sealed tenders from two parties who were competing for the purchase of them, and undertook to accept the highest net money tender. One of the competitors offered such a sum as would exceed by 200*l.* the amount offered by the other:—

*Held*, that a tender in this form did not answer the description of the highest net money tender, and an order was made striking out the statement of claim in an action for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action. *SOUTH HETTON COAL COMPANY v. HASWELL, SHOTTON, AND EASINGTON COAL AND COKE COMPANY* - C. A. 465

2. — Validity—Cheque—Authority of Solicitor.

Appeal of plaintiffs from Kekewich J., [1897] 1 Ch. 171, dismissed with costs, on the facts. *BLUMBERG v. LIFE INTERESTS AND REVERSIONARY SECURITIES CORPORATION* - C. A. 27

**TITLE**—Conditions of sale—Rescission—Defective title—No title - 458  
*See VENDOR AND PURCHASER.* 3.

— Defect in, unknown to vendor—Delay in completion—Interest - 433  
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- TITLE-DEEDS**—Not in possession of vendor—  
Expense of obtaining - - 419  
See VENDOR and PURCHASER. 2.  
— Possession of—Priority—Negligence 315  
See COMPANY. 3.

**TRADE COMPETITION**—*Underselling—Manufacturer and Retail Dealer—Retailing Goods at Wholesale Price—Damage to Manufacturer—Right to issue Advertisement—Misrepresentation—Dammum absque Injuria.*

As a general rule a trader may sell at any price whatsoever any goods, including goods of another's manufacture, which he either has in stock or expects to acquire, and may offer the same for sale by advertisement, although he thereby damages the trade of the manufacturer; and his motives for so doing cannot be inquired into.

The defendant, a retail dealer, advertised for sale in a newspaper a new piano of the plaintiffs' manufacture of a specified character at the price at which the plaintiffs supplied the same to the trade, and thereby caused other dealers to give up dealing with the plaintiffs; and he continued the advertisement after he ceased to have in stock any pianos of the plaintiffs' manufacture, and after the plaintiffs had refused to supply him, in the expectation of being able to acquire pianos of the plaintiffs' from other dealers:—

*Held*, (1.) that, apart from any question of misrepresentation, the defendant had a legal right to issue the advertisement; (2.) that, though the advertisement amounted to an implied representation that the defendant had in his possession a piano of the advertised description, such misrepresentation was not the cause of the damage to the plaintiffs' trade, and consequently gave no right of action. *AJELLO v. WORSLEY*  
Stirling J. 274

**TRADE NAME**—*Former Concurrent user by Two Firms—Discontinuance of User by One for several Years.*

Where there has been a concurrent user of a trade name by A. and B., but the user thereof by B. has practically ceased for some years, and A. has in the meantime acquired a large sale for his goods and a reputation in the market under the trade name, so that the name has become associated solely with the goods of A., B. may not afterwards revive the use of the name in his business in such a way as to pass off his goods as those of A. *DANIEL & ARTER v. WHITEHOUSE*

Gorell Barnes J. 685

## 2. — Injunction—Form of Order.

Where a person has taken a name as his own name for the purpose of using the name in trade to pass off his boots and shoes as the manufacture of another whose real name it was, he was restrained absolutely from using the name in connection with the sale or manufacture of boots or shoes. *F. PINET & C<sup>ie</sup> v. MAISON LOUIS PINET, LIMITED* - - - North J. 179

— Similarity of name—Deception—Injunction  
See COMPANY. 7. 539

**TRANSFER**—English stocks and shares—Residence out of jurisdiction—Foreign curator - - - 257  
See LUNACY. 1.

**TRESPASS**—*Action against Public Officers in their Official Capacity—Agent of Executive Government—Liability of Servants of the Crown—Prerogative—Jurisdiction—Amendment.*

Alleged authority of an executive department is no justification for a trespass, but only those who commit or in fact authorize the trespass are liable.

The head of a Government Department is not liable for wrongful acts of officials in the Department, unless it can be shewn that the act complained of was substantially the act of the head of the Department himself.

The plaintiffs commenced an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass:—

*Held*, that though the plaintiffs could sue any of the defendants individually for trespasses committed or threatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie; leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land, was also refused, and the action was dismissed with costs. *RALEIGH v. GOSCHEN*

Romer J. 73

**TROVER**—Book—Piracy—Infringement—Detinue—Combining causes of action - 58  
See COPYRIGHT.

**TRUST FUND**—Mortgage of share in—Right of mortgagee to receive whole amount of share - - - 350  
See MORTGAGE. 2.

**TRUSTEE**—*Appropriation of Assets—Residue—Settled Shares.*

Where a residuary trust fund is settled by will upon trust for several persons and their families, the trustees have power *virtute officii* to appropriate specific investments to any of the settled shares before the period of final division without making any corresponding appropriation to the other shares.

A testator gave the proceeds of his residuary estate upon trust as to one undivided sixth to pay the income to his eldest son for life, and after his death to pay the capital to his children, and as to the remaining five-sixths upon similar trusts for the testator's four other sons and his daughter and their children, and he empowered his trustees to pay over a portion of the capital of the settled shares to any of his six children absolutely, notwithstanding the previous trusts. In 1881 the then trustees paid to each of the five sons one-half of his share, and to the daughter one-sixth of her share absolutely; and they also set aside for the daughter and her children a sum of stock sufficient at its then value to make up with the sum advanced to her one-half of her share. The income of the stock was paid to the daughter till her death in 1896:—

*Held*, that there was a valid appropriation of



**TRUSTEE—continued.**

the stock to the daughter's share, and that the distribution to her children ought to proceed on that footing. *In re NICKELS. NICKELS v. NICKELS* Stirling J. 630

**2. — Breach of Trust—Mortgage of Trust Estate along with Trustee's own Property—Appropriation.**

The Court of Appeal in 1896 declared B. to have purchased certain Ceylon estates as a trustee for R., subject to B.'s lien for the purchase-money and other advances for the purposes of the estates, and an account was directed of all sums of money received by B. in respect of any sale, mortgage, or other disposition of the estates or any of them. In July, 1876, B., who had previously obtained from C. & Co. two advances of 20,000*l.* and 25,000*l.* on the security of his own estates in Cumberland, had obtained from them 20,000*l.* more, and signed this memorandum: "Messrs. C. & Co.,—You have now advanced to me 20,000*l.*, 25,000*l.*, and 20,000*l.* on security of my Cumberland estates. If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates." In July, 1879, by a memorandum indorsed on this memorandum, B. stated to C. & Co. that he had directed his agent to execute to them, in pursuance of the former memorandum, a formal charge on the D. and D. estates (two of the estates to which R. afterwards established his title) for 35,000*l.*, the balance then due from him to C. & Co. A mortgage in Ceylon was executed accordingly. C. & Co. never resorted to the D. and D. estates. The official referee in taking the accounts charged B. with 20,000*l.* as money received by him in respect of a mortgage on part of the trust estate. Kekewich J. struck out this sum altogether:—

*Held*, on appeal, that as B. had received 20,000*l.* on a charge on the Cumberland estates, and a promise to give a charge on the D. and D. estates, which promise was afterwards followed by an actual charge, he must be treated as having raised that sum rateably out of the Cumberland estates and the D. and D. estates according to their respective values after deducting the prior incumbrances upon them, and must be debited with the share attributable to the D. and D. estates. *ROCHEFOUCAULD v. BOUSTEAD* C. A. 550

**3. — Breach of Trust—Solicitor and Client—Investment advised by Solicitor to Trustees—Contributory Mortgage—Priority.**

Trustees acting under the advice of their solicitors invested 3000*l.* part of the trust fund, upon the security of a contributory mortgage for 6000*l.*, the remaining 3000*l.* being advanced by the solicitors themselves. The legal estate in the mortgaged property was not vested in the trustees, the mortgage being taken in the names of one of them and of a stranger to the trust. The mortgagees executed a contemporaneous declaration of trust declaring that their names should stand in the mortgage as to the sum of 3000*l.*, part of the said sum of 6000*l.*, and the interest thereof in trust for the trustees, and as to the further sum of 3000*l.*, "residue of the said sum of 6000*l.* and the residue of the interest to become due and payable" under the mortgage, in trust for the solicitors.

**TRUSTEE—continued.**

tors. By another contemporaneous document the solicitors guaranteed to the trustees the sufficiency of the security for the sum of 3000*l.* and interest, and further guaranteed to the trustees the repayment of the 3000*l.* and interest. The solicitors assigned their portion of the security to other persons, and were afterwards adjudicated bankrupts. The mortgaged property having failed to realize the whole of the 6000*l.*:—

*Held*, that the trustees were not entitled to priority for their 3000*l.* as against the assignees of the solicitors. *STOKES v. PRANCE*

Stirling J. 212

— Fiduciary power—Power to debenture-holder to appoint receiver - 133  
See COMPANY. 4.

— Solicitor-executor—Profit costs—Power to charge—Insolvent estate - 297  
See SOLICITOR. 3.

**ULTRA VIRES**—Sale of undertaking—Compensation to directors - - - 358  
See COMPANY. 10.

**UNDISCHARGED BANKRUPT**—After-acquired property—Assignment of interest under will—Bona fides - - - 675  
See BANKRUPTCY.

— Clause validating the acts of de facto directors - - - 6  
See COMPANY. 6.

**USER**—Former concurrent user by two firms—Discontinuance of user by one for several years - - - 685  
See TRADE NAME. 1.

— Interim user—Land not immediately required for purpose for which it was acquired - - - 66  
See LOCAL GOVERNMENT. 2.

**VACATING REGISTRATION**—Lis pendens—Incorporating order in judgment - 313  
See PRACTICE. 4.

**VENDOR AND PURCHASER** — Completion — Delay in—Contract for Sale—Defect in Title unknown to Vendor—"Default"—Interest.

Delay in the completion of a purchase by the day fixed by the contract, occasioned by the time occupied in remedying a defect in the vendor's title which was not and could not be known to him at the time of entering into the contract, is not attributable to a "default" on his part so as to prevent interest running against the purchaser under a clause in the contract for payment of interest by the purchaser "if from any cause whatever other than the default of the vendor" the purchase should not be completed by the day fixed.

*In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, and *In re Helling and Merton's Contract*, (1893) 3 Ch. 269, distinguished. *In re Woods and Lewis' Contract* - Romer J. 433

**2. — Completion—Documents not in Possession of Vendor—Expense of obtaining—Title-deeds—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.**

Sub-s. 6, s. 3, of the Conveyancing and Law

**VENDOR AND PURCHASER—continued.**

of Property Act, 1881, does not affect the ordinary right of a purchaser to have the title-deeds handed over to him on completion, and the mere fact that obtaining the deeds for this purpose may cause the vendor trouble and expense is no answer to the purchaser's demand.

On an open contract the vendor must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract. *In re DUTHY AND JESSON'S CONTRACT*

Romer J. 419

3. — *Conditions of Sale—Annulling Sale, Vendor's Power of—Title—Conveyance—Requisitions—Outstanding Estate, Getting in—Contract—Rescission—Defective Title—No Title.*

A condition of sale empowering the vendor to annul the sale if the purchaser makes any objection or requisition "as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale," which the vendor is unable or unwilling to comply with, extends to a matter of conveyance as well as of title.

Thus, where a vendor-mortgagee of leaseholds who, having contracted to sell the entire term, turned out, on the investigation of the title by the purchaser, to hold by a sub-demise the bare legal estate in which was outstanding, and expressed himself as unable or unwilling to comply with a requisition by the purchaser that the person having the legal estate should join in the conveyance; it was held by the Court of Appeal that the vendor was entitled, under a condition in the above form, to annul the sale.

Decision of Kekewich J. reversed.

The ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none.

*Bowman v. Hyland*, (1878) 8 Ch. D. 588, explained. *In re DEIGHTON AND HARRIS'S CONTRACT* - - - C. A. 458

4. — *Soil of Highway—Street in Town—Right of Adjoining Owner ad medium filum viæ—Conveyance of Land Adjoining Street—Presumption.*

The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country; and this presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the medium filum viæ; in such a case the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor. *In re WHITE'S CHARITIES. CHARITY COMMISSIONERS v. LONDON CORPORATION* - - - Romer J. 659

5. — *Specific Performance—Delay—Lien for Deposit.*

In 1886 a vendor contracted in writing to sell free from incumbrances a contingent reversionary interest in personality to a purchaser who paid a deposit on the purchase-money. The reversion proved to be incumbered, and the purchaser insisted on a conveyance free from incumbrances, but was told that the incumbrances would be paid off, which was never done. The vendor

**VENDOR AND PURCHASER—continued.**

afterwards created further charges on the reversionary interest to persons who had notice of the contract, and was adjudicated a bankrupt in 1888. In the same year the bankruptcy was annulled, upon the acceptance of a composition by his creditors, and under the scheme of arrangement the whole of his property was sold by his trustee. In 1891 the purchaser became bankrupt, having previously assigned his interest under the contract to P., who subsequently assigned the same to B. No attempt having been made to enforce the contract, the reversion fell into possession in 1895, and B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser:—

Held, (1) that the delay was a bar to any claim for specific performance; (2) that the purchaser was a secured creditor of the vendor in respect of the deposit, and that the purchaser must under the circumstances be treated as having elected to rely on his security; and as no Statute of Limitations applied B. was entitled to enforce his lien. *LEVY v. STODGON*

Stirling J. 478

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**VICTORIA**—*Laws of—Undischarged bankrupt—After-acquired property* - - - 675  
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**VOLUNTARY SETTLEMENT**—*Construction—Reversionary Interest—Power of Appointment—Recital—Estoppel.*

The plaintiff, born in 1875, was an only child. Her father died in 1886. She married in January, 1892, being then entitled under the settlement made on the marriage of her father and mother, dated April 15, 1874, subject to the exercise by her mother of the power of appointment contained in that settlement in favour of the issue of the marriage and to her mother's life interest to the property comprised in the settlement.

By a voluntary settlement dated July 27, 1892, after reciting that the property comprised in the settlement of April 15, 1874, was vested in trustees upon trust to pay the income to the plaintiff's mother for life, and upon her death upon trust for the plaintiff, her heirs, executors, administrators, and assigns, the plaintiff conveyed all her reversionary property under the settlement of April 15, 1874, to trustees upon trust for conversion and to pay the income to herself for life, then to her husband for life, and, on the death of the survivor, on the usual trusts for the benefit of their issue, with a trust in default of issue in favour of the plaintiff. The settlement contained no covenant to settle after-acquired property, and no power of revocation.

In August, 1897, the plaintiff's mother, in exercise of the power contained in the settlement of April 15, 1874, irrevocably appointed that the trustees of that settlement should stand possessed of the property therein comprised in trust for the plaintiff, her executors, administrators, and assigns absolutely. There was no issue of the marriage between the plaintiff and her husband:—

Held, that the deed of July 27, 1892, only passed the interest which the plaintiff had under

**VOLUNTARY SETTLEMENT**—*continued.*\*

the deed of April 15, 1874, and did not comprise the interest taken by her under the appointment.

The recital, though inaccurate, was true as far as it went, and worked no estoppel either legal or equitable.

Equitable estoppel is not applied in favour of a volunteer.

*Citizens' Bank of Louisiana v. First National Bank of New Orleans*, (1873) L. R. 6 H. L. 352, discussed. *LOVETT v. LOVETT* - *Romer J. 82*

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**WILFUL DEFAULT**—Executor—Breach of duty  
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**WILL**—Absolute Gift—Subsequent Gift over of Portion undisposed of in Legatee's Lifetime.

By his will, subject to payment of his debts and funeral and testamentary expenses, a testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give . . . the same" in trust for sale for the benefit of other persons. The wife was also appointed sole executrix. On the testator's death his widow took possession of his estate, and his debts and funeral and testamentary expenses were paid during her lifetime. At her death a considerable part of the estate remained unsold and undisposed of:—

*Held*, that the widow took an absolute interest, and that the part undisposed of passed by her will.

*In re Pounder*, (1886) 56 L. J. (Ch.) 113, distinguished. *In re JONES*. *RICHARDS v. JONES*  
*Byrne J. 438*

2. — Absolute Gift of Personality—Codicil—Gift of same Personality for Life with Remainder to Children—"Instead of such bequests in the manner expressed in" the Will—Absolute Gift in the Will not revoked by the Codicil.

A testator by his will bequeathed his personal estate to his two daughters A. and B. equally.

By a codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughters absolutely" his executors should stand possessed of his personal estate upon trust for sale and conversion, and to pay the income in moieties to his two daughters for life, and on the death of either of them to pay the moiety of the trust moneys to their children as they should by deed or will appoint. The codicil contained no gift over in the event of a daughter dying without issue.

**WILL**—*continued.*

B. died without ever having had any issue, having by her will devised and bequeathed all her real and personal estate to her executors, upon the trusts therein mentioned:—

*Held*, that there was no intestacy as to the moiety of the personal estate given to B., there being no revocation under the codicil of the absolute gift given to her by the will.

*Doe v. Marchant*, (1843) 6 Man. & G. 813, followed. *In re WILCOCK*. *KAY v. DEWHIRST*

*Romer J. 95*

3. — Charitable Bequest—Discretion of Trustees—Mixed Fund—Pure and Impure Personal Estate, and Proceeds of Sale of Real Estate—Gift to "such Charitable Institutions and Objects as my Trustees may determine"—Mortmain—Charitable Uses Act, 1735 (9 Geo. 2, c. 36), ss. 1, 3, 4.

A testator, who died before the Mortmain and Charitable Uses Act, 1888, by his will gave real and personal estate upon trust for sale and conversion; and directed his trustees to apply one-tenth of the fund to "such charitable institutions and objects as my said trustees may determine":—

*Held*, by the Court of Appeal, (1.) that the gift applied and extended not only to the pure, but also to the impure personal estate and the proceeds of the real estate of the testator, and conferred upon the trustees a power of selection; (2.) that if and so far as the trustees selected charitable institutions and objects exempted from the operation of 9 Geo. 2, c. 36, the names of the charitable institutions and objects selected would be read into the will, and the gift would be a good charitable gift in their favour; (3.) that, as to the impure personality and the proceeds of the sale of real estate, no exercise of the power of selection in favour of an unexempted charitable institution or object would operate as a valid gift.

If a gift of this kind gives the trustees a discretion enabling them to select such as are valid from a class including valid and invalid objects, that is sufficient to prevent the gift from being voided by the statute of 9 Geo. 2, c. 36.

Although some parts of *Stuart v. C.*'s judgment in *Levis v. Allenby*, (1870) L. R. 10 Eq. 668, may be open to comment, there is no necessary invalidity in such a gift as was the subject of that decision.

The principle upon which the Court proceeded in *Levis v. Allenby* is the same as that on which the Court acted in *Mayor of Faversham v. Ryder*, (1854) 5 D. M. & G. 350, *University of London v. Yarrow*, (1857) 1 De G. & J. 72, and *Carter v. Green*, (1857) 3 K. & J. 591.

*Johnston v. Swann*, (1818) 3 Madd. 457, and *Baker v. Sutton*, (1836) 1 Keen, 224, if and so far as they differ from *Levis v. Allenby*, must be taken to be overruled.

The judgment of North J. affirmed with a variation. *In re PIERCY*. *WHITWHAM v. PIERCY*  
*C. A. 565*

4. — Class—Period of ascertaining—Gift of Income to children of A.—Perpetuity—Construction of Will.

A testator directed his trustees to pay the interest, dividends, and annual profits of a share-



**WILL—continued.**

of his personal estate unto the children of his sister, and to divide the same equally among them during their lives, and after their deaths to divide the share equally between their children. The testator's sister survived him:—

*Held*, that the gift of income to the children of the sister was confined to children born at the date of the testator's death, and that the gift over to the children's children was therefore valid, and not void for remoteness.

*In re Wenmoth's Estate*, (1887) 37 Ch. D. 266, distinguished. *In re POWELL. CROSLAND v. HOLLIDAY* - - - - - **Kekewich J. 227**

**5. — Contingent Remainders—Infants—Intermediate Rents—Legal and Equitable Limitations.**

A testator by his will dated in 1878 devised certain real property to the use of trustees in fee simple upon trust for A. for life, and after her death, for her children who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common. The testator died in 1881; A. died in 1885, leaving six children all infants and unmarried. The eldest child attained twenty-one in March, 1887:—

*Held*, that the eldest child was entitled on attaining twenty-one to the entirety of the rents until the next child attained a vested interest, and so on, as if the limitations had been legal.

*In re AVERILL. SALSURY v. BUCKLE*

**Romer J. 523**

**6. — Dividends—Public Company—Apportionment—Income or Capital—Construction of Will—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 5, 7.**

Every company registered under the Companies Act, 1862, is a public company within the meaning of the term in the Apportionment Act, 1870.

A bequest of shares in a limited company, coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, operates as an exclusion of the Apportionment Act.

A testator bequeathed certain shares in a limited company to trustees upon trust to sell, with a power of postponement, and stand possessed of the proceeds and the shares remaining unsold upon trust to receive the annual produce thereof and hold the same in trust for the testator's children and remoter issue in succession, and declared that every share bequeathed by his will should carry the dividend accruing thereon at his death. The dividends were payable annually:—

*Held*, that the trustees took the whole of the dividend for the year in which the testator died without apportionment, and that such dividend was payable as income to the tenants for life under the will. *In re LYSAGHT. LYSAGHT v. LYSAGHT* - - - - - **C. A. 115**

**7. — Falsa Demonstratio—Debt—Legacy—Recital—Erroneous Statement of Indebtedness—Intention to confer Bounty—Construction of Will.**

A testatrix bequeathed to her grandniece "the sum of 300*l.* in addition to the sums owing to her from my late husband's estate." The will contained no direction to pay debts. There were

**WILL—continued.**

no sums legally owing to the grandniece from the husband's estate, but there were two sums of 500*l.* for which the husband (as the testatrix knew) had given her an I O U and promissory note, which, however, were not enforceable for want of consideration. The testatrix was universal devisee and legatee under her husband's will:—

*Held*, having regard to the surrounding circumstances, that the intention of the testatrix was to include the two sums in question in the bequest.

*Per Vaughan Williams L.J.*: An erroneous recital in a will of indebtedness on the part of a testator to a legatee, even though accompanied by a direction to pay, will not amount to a gift of the supposed debt, in the absence of any indication in the will of an intention of bounty in respect thereof; but such intention may be implied from the general scope of the will.

*Adams v. Adams*, (1842) 1 Hare, 537, *Whitfield v. Clement*, (1816) 1 Mer. 402, and *Wilson v. Morley*, (1877) 5 Ch. D. 776, discussed. *In re ROWE. PIKE v. HAMLYN* - - - **C. A. 153**

**8. — Leaseholds—Tenant for Life—Remainderman—Covenants—Rent—Repairs—Liability.**

A testator who died possessed of a leasehold house held by him on a repairing lease bequeathed it directly (without the intervention of trustees) to his niece for life, and after her death to other persons absolutely, and appointed executors:—

*Held*, that the niece, the tenant for life, was not bound to perform any of the covenants in the lease.

*In re Courtier*, (1886) 34 Ch. D. 136, *In re Baring*, [1893] 1 Ch. 61, and *In re Redding*, [1897] 1 Ch. 876, discussed. *In re TOMLINSON. TOMLINSON v. ANDREW* - **Kekewich J. 232**

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